(8)

No. 83-2146-CFX
Status: GRANTED

Title: Richard Wilson and Martin Vigil, Petitioners
v.
Gary Garcia

Docketed:
June 28, 1984

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Hall,Bruce, Fisher,Diane, Allen,Be
M.

Counsel for respondent: Farber,Steven G.

Entry	Date	Note	Proceedings and Orders
1	Jun 28 1984	G	Petition for writ of certiorari filed.
2	Aug 1 1984		Brief of respondent Gary Garcia in opposition filed.
3	Aug 1 1984		DISTRIBUTED. September 24, 1984
4	Oct 1 1984		Petition GRANTED.
			**********
5	Nov 2 1984	G	Motion of respondent for leave to proceed further here in forma pauperis filed.
6	Nov 13 1984		Motion of respondent for leave to proceed further here in forma pauperis GRANTED.
7	Nov 15 1984		Brief of petitioners Richard Wilson, et al. filed.
8	Nov 15 1984		Joint appendix filed.
9	Nov 16 1984	G	Motion of respondent for appointment of counsel filed.
10	Nov 15 1984		Brief amicus curiae of Oklahoma County filed.
11	Nov 23 1984		DISTRIBUTED. November 30, 1984. (Motion of respondent for appointment of counsel).
12	Dec 3 1984		Motion for appointment of counsel GRANTED and it is ordered that Steven G. Farber, Esquire, of Santa Fe, New Mexico, is appointed to serve as counsel for the respondent in this case.
13	Dec 4 1984		SET FOR ARGUMENT. Monday, January 14, 1985. (2nd case)
14	Dec 6 1984		Record filed.
15	Dec 6 1984		Certified C. A. proceedings received.
16	Dec 10 1984		CIRCULATED.
17	Dec 11 1984	X	Brief of respondent Gary Garcia (TO BE PRINTED) filed.
18	Dec 15 1984		Record filed.
19	Dec 15 1984		Certified copy (1 volume) original record received.
20	Jan 5 1985	X	Reply brief of petitioners Richard Wilson, et al. filed.
21	Jan 14 1985		ARGUED.

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83-2146

No. .....

Office - Supreme Court, U.S.
FILED
JUN 28 1984
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

—o—

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

vs.

GARY GARCIA,

Respondent.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

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QUESTIONS PRESENTED

1. When an action for the deprivation of constitutional rights is brought in federal court under 42 U.S.C. § 1983, may the federal court disregard the limitations period held applicable by the state's highest court to an identical action brought in state court under 42 U.S.C. § 1983, where the limitations period applied in state court is neither too short nor inconsistent with the Constitution and laws of the United States?

2. If the federal court may disregard the limitations period applied by the state's highest court to § 1983 actions filed in state court, what are the characteristics of an action under 42 U.S.C. § 1983 that the federal court must consider in identifying the most closely analogous cause of action and its applicable statute of limitations as required under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)?

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No. .....

In The

Supreme Court of the United States

October Term, 1983

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

vs.

GARY GARCIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Richard Wilson and Martin Vigil petition the United States Supreme Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on March 30, 1984.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 731 F.2d 640 (10th Cir. 1984). The opinion of the district court (App. B) is not reported.

JURISDICTION

The judgment of the court of appeals (App. A) was entered on March 30, 1984. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

This Petition involves consideration of the following statutory provisions: 42 U.S.C. § 1983, 42 U.S.C. § 1988, N.M. Stat. Ann. § 41-4-12 (1978), N.M. Stat. Ann. § 41-4-15 (1978), N.M. Stat. Ann. § 37-1-8 (1978), and N.M. Stat. Ann. § 37-1-4 (1978). The full text of each of these statutes is set forth in the Appendix.

STATEMENT OF THE CASE

Respondent Gary Garcia brought this action under 42 U.S.C. § 1983 against Petitioners Richard Wilson, a former New Mexico State Police officer, and Martin Vigil,

Chief of the New Mexico State Police (the Officers), seeking money damages for the alleged deprivation of constitutional rights arising out of Garcia's arrest by Officer Wilson. Garcia alleged that Officer Wilson used excessive force in connection with the arrest and that Chief Vigil failed to provide adequate supervision. According to the complaint, the incident in question occurred on April 27, 1979. This action, however, was not filed until January 28, 1982—more than two years later.

In response to Garcia's complaint, the Officers filed motions to dismiss on the ground that the action was barred by the applicable statute of limitations. In support of their motions, the Officers relied on the holdings and reasoning of *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), and *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982). In the *DeVargas* cases, New Mexico's highest appellate courts reviewed the guidelines for selecting the statute of limitations applicable to an action brought under § 1983. Reasoning that under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), a court must apply the limitations period applicable to the state cause of action most closely analogous to the action brought under § 1983, those courts ruled that the most closely analogous state cause of action in New Mexico to a police brutality action brought under § 1983 is set forth in section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978), which provides a cause of action against New Mexico law enforcement officers for assault, battery, or the deprivation of constitutional rights. A § 1983 police brutality claim against New Mexico law enforcement officers

brought in state court is therefore governed by the two-year limitations period applicable to claims asserted under section 41-4-12. N.M. Stat. Ann. § 41-4-15 (1978); *DeVargas,* 97 N.M. at 564, 642 P.2d at 167.

On July 21, 1982, the trial court issued its Order denying the Officers' motions. In its Opinion (App. B at App. 41-43), the court refused to follow the state court decisions in *DeVargas,* holding instead that a § 1983 action is *sui generis* and not analogous to any state cause of action, including one brought under section 41-4-12. (App. B at App. 43). The trial court characterized Garcia's claim as an "action on a statute" and held that, since New Mexico has no statute of limitations specifically applicable to statutory actions, Garcia's claim would be governed by New Mexico's four-year residual statute of limitations applicable to an action not subject to any other specified period of limitations. N.M. Stat. Ann. § 37-1-4 (1978).

Recognizing the conflict between its Opinion and the position adopted by New Mexico's highest courts, the trial court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). On January 6, 1983, the Court of Appeals for the Tenth Circuit granted the Officers' request for leave to appeal. The matter was argued and submitted to a three-judge panel on March 7, 1983, but the submission order was vacated on May 23, 1983. Thereafter, on the court's own motion, the appeal was submitted to the full court for an *en banc* determination.

On March 30, 1984, the Court of Appeals sitting *en banc* issued its Memorandum Opinion and Order of Judgment. *Garcia v. Wilson,* 731 F.2d 640 (10th Cir. 1984). In its Opinion, the court rejected the trial court's characterization of § 1983 as an action on a statute. Nevertheless, the Court of Appeals affirmed the order of the trial court refusing to dismiss the complaint. Using this case as an opportunity to survey the conflicting decisions within and outside the Circuit on the applicability of state statutes of limitations to § 1983 actions, the Tenth Circuit adopted the view that all § 1983 claims within the Circuit should be uniformly characterized for statute of limitations purposes as actions for injury to personal rights. Accordingly, the court held that the appropriate limitations period for all § 1983 actions filed in New Mexico was that set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which provides a three-year limitations period for actions alleging "an injury to the person or reputation of any person." Consequently, the court concluded that Garcia's complaint was timely filed.

In its Opinion, the Tenth Circuit acknowledged that its conclusion was at variance with the New Mexico Supreme Court's holding in *DeVargas,* but declined to follow that decision. The Tenth Circuit also acknowledged that its approach to the statute of limitations issue conflicted with that adopted by at least three other circuits. *See, e.g., McClam v. Barry,* 697 F.2d 366 (D.C. Cir. 1983) (holding that § 1983 claims must be characterized for statute of limitation purposes by the underlying facts alleged in the plaintiff's complaint); *Aitchison v. Raffiani,* 708 F.2d 96, 101 (3d Cir. 1983) (reaffirming *Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (*en banc*), which held that the limitations period to be applied is the statute that would have been applied if the same or a similar action were filed in state court); *Kosikowski v. Bourne,* 659 F.

2d 105 (9th Cir. 1981) (holding that a state's articulation of the limitations period specifically applicable to § 1983 claims is determinative of the federal issue and relieves the federal court from the task of characterizing a civil rights claim). As will be demonstrated below, the Tenth Circuit's decision, in which the court took pains to identify and reject the views of so many other courts, was erroneous in its own right. Moreover, this case provides an ideal opportunity to clarify an important area of § 1983 jurisprudence.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit's Approach To The Statute Of Limitations Issue Implicates Established Principles Of Federalism And Creates An Irreconcilable Conflict Between Federal And State Courts In New Mexico.

Congress has not provided a specific limitations period to govern actions brought under § 1983. Section 1988 of title 42, however, provides that where the provisions of that title are "deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State[s] . . . shall be extended to and govern" federal courts in the trial and disposition of any action brought under title 42 as long as the state law applied is not inconsistent with the Constitution or laws of the United States. Thus, this Court has consistently held that in the absence of a federal statute of limitations, § 1988 requires federal courts to apply to an action brought under § 1983 the state statute of limitations which would be applicable to the most

closely analogous state cause of action, unless that state limitations period is inconsistent with the Constitution and laws of the United States. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *see also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

While the characterization of an action for the purpose of selecting the appropriate state limitations period is a question of federal law, the characterization that state law would impose may not be rejected unless that characterization is "inconsistent with the constitution and laws of the United States." *Board of Regents v. Tomanio*, 446 U.S. at 485; *see International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). Thus, when the state has adopted a characterization of a § 1983 action which fits within the framework of its own system of limitations, and which does not conflict with federal law or policy, the federal court should defer to the state's characterization and to its selection of a limitation period. *See Board of Regents v. Tomanio, supra; Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc., supra.*

A straightforward application of this established rule leads to a result opposite the one reached by the Tenth Circuit. The New Mexico Supreme Court has held that a § 1983 action for police brutality brought in state court is governed by the two-year statute of limitations set forth in N.M. Stat. Ann. § 41-4-15 (1978). *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982); *see DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981). The Supreme Court in *DeVargas* held that the state cause of action "most closely analogous" to the § 1983 action before them was an action

under section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978) (hereinafter "section 12"), which, like § 1983, imposes liability for the "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States. . . ." The court therefore applied to that case the two-year limitations period set forth in § 41-4-15 which is applicable to actions brought under section 12.

Despite the admonition of this Court that a federal court must "[rely] on the State's wisdom in setting a limit . . . on the prosecution" of a federal civil rights claim, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 464, the court of appeals refused the guidance of the New Mexico courts in *DeVargas*. The court ruled instead that all actions filed under § 1983 in federal court would be governed not by the two-year period set forth in section 41-4-15, but by the three-year period set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which governs actions for injuries to the person.

The Tenth Circuit's refusal to follow *DeVargas* and its failure to give deference to the express intent of the State of New Mexico implicates that fundamental principle of federalism recognized in *Johnson v. Railway Express Agency*. Rather than seeking to harmonize § 1983 jurisprudence with comparable state law, the Tenth Circuit's decision creates an irreconcilable conflict between federal and state courts. In the *DeVargas* case, New Mexico's highest court expressly adopted a two-year limitations period for a § 1983 action involving police brutality. The Tenth Circuit now has adopted a three-year limitations period for exactly the same claim. As a result, the choice of the statute of limitations which will govern a § 1983

action against law enforcement officers in New Mexico depends solely on whether the action is filed in federal or state court. Moreover, the longer limitations period adopted by the Tenth Circuit allows forum-shopping litigants in New Mexico to avoid the express decision of the state's lawmakers as to the proper balance to be struck between the interests of individuals injured by police misconduct and the interests of the state. This is precisely the sort of result federal courts have attempted to discourage since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

The conflict between the decision of the court of appeals and the decision of New Mexico's highest court presents a question of vital importance in our dual system of federal and state courts. This conflict provides a sufficient ground for this Court to grant a writ of certiorari to review the decision below.

II. The Tenth Circuit's Refusal To Defer To State Law Conflicts With The Decisions Of Other Circuits And Highlights The Dispute, Yet Unaddressed By This Court, Over The Application To § 1983 Actions Of Statutes Of Limitations Selected By State Law.

The Tenth Circuit, in its decision, declined to apply to this action the two-year limitations period selected by New Mexico's highest court as the limitations period applicable to identical § 1983 action filed in New Mexico state courts. This decision conflicts with the decisions of several circuits.

The Court of Appeals for the Ninth Circuit, for example, holds that once a state has specified a statute of limitations for § 1983 actions, a federal court must accept

the state's decision unless to do so would violate federal law or policy. *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). In *Kosikowski*, the Ninth Circuit held that the two-year statute of limitations contained in the Oregon Tort Claims Act governed an action brought in federal court under 42 U.S.C. § 1983. Although that court previously had ruled that § 1983 actions filed in Oregon were governed by the six-year limitations period applicable to causes of action created by statute, *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980), the court in *Kosikowski* held that once a state has determined that a particular limitations period applies to actions filed under § 1983, a federal court need not and should not go further. The court therefore ruled that it was bound by legislation enacted after its decision in *Clark* by which the state legislature defined the word "tort" when used in the state tort claims act to include specifically any violation of § 1983.

> This precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest.

659 F.2d at 107.[1]

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[1] The fact that in New Mexico the selection of the statute of limitations applicable to a § 1983 police brutality action was made by the judiciary and not by the legislature is a distinction without a difference: an interpretation of New Mexico

(Continued on next page)

Similarly, both the Third Circuit and the Fifth Circuit have held that the appropriate statute of limitations to apply in a § 1983 action is the one that a state court would have applied had the action been filed in that court. *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Polite v. Diehl*, 507 F.2d 119, 122 (3d Cir. 1974) (en banc); *see also Meyers v. Pennyback Woods Home Ownership Association*, 559 F.2d 894, 900 (3d Cir. 1977); *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976). The case of *Aitchison v. Raffiani*, for instance, involved a claim brought under § 1983 for damages arising out of the plaintiff's allegedly wrongful discharge from his employment. Named as defendants in the case were the mayor and members of the borough council of Fair Lawn, New Jersey, the borough manager and the borough itself. The defendants moved to dismiss the action on the ground, *inter alia*, that it was barred by the two-year limitations period set forth in the New Jersey Tort Claims Act, N.J. Stat. Ann. § 59:8-8 (1982). The district court granted the defendants' motion, and the Third Circuit affirmed.

Noting the admonition of this Court in *Board of Regents v. Tomanio*, 446 U.S. at 484, that the application of state statutes of limitations to actions filed in federal court under § 1983 is not permissive but mandatory, the court

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law by the New Mexico Supreme Court binds a federal court interpreting New Mexico law as surely as any statute passed by the New Mexico legislature. *Bauserman v. Blunt*, 147 U.S. 647 (1893) (holding that federal courts are bound by decisions of a state's highest court interpreting the scope of a state statute of limitations); *Powell v. St. Louis Dairy Co.*, 276 F.2d 464 (8th Cir. 1960); *St. Louis & San Francisco Railroad Co. v. Quinette*, 251 F. 773 (8th Cir. 1918).

in *Aitchison* reasoned that since the two-year limitations period on which the defendants relied would have been applied to the plaintiff's action had it been brought in a New Jersey state court, that same period of limitations must be applied to the action when filed in federal court. The court held that a state's limitations scheme provides the framework within which a § 1983 claim must be examined when selecting an applicable statute of limitations, and recognized that it was reasonable for "a state to assume that the public interest in the repose of claims against a governmental agency is worthy of special consideration." 708 F.2d at 103.

In the instant case, there is no doubt concerning New Mexico's position regarding the most analogous state cause of action and the appropriate limitations period for police brutality claims under § 1983. Moreover, there can be no serious contention, and neither the plaintiff nor the courts below have made one, that the limitations period that New Mexico law would impose (two years) is either unreasonable or inconsistent with the purposes and policies of federal law. The court below declined to follow New Mexico law simply because of its own objections to New Mexico's method of characterizing an action brought under § 1983.

Since the Tenth Circuit in the instant case specifically rejected the statute of limitations which would have been applied to this action had it been brought in state court, the decision below creates an irreconcilable conflict among the Third, Fifth, Ninth and Tenth Circuits. The conflict among the circuits focuses on one of the most important and current issues in § 1983 litigation, that is, whether a federal court may disregard the limitations period that

state law would impose where the limitations period applied by state law is neither too short nor inconsistent with the Constitution and laws of the United States. The importance of this question and the conflict of the circuits on this issue justify the grant of certiorari to review the decision below.

III. Identification Of The Considerations Relevant To The Characterization Of A Civil Rights Claim For The Purpose Of Selecting The Most Analogous Cause Of Action Is An Issue Raised By The Decision Below Which Has Not Yet Been Addressed By This Court.

While it is undisputed that a federal court must apply to a § 1983 action the limitations period applicable to the "most closely analogous" cause of action, *Board of Regents v. Tomanio,* this Court has never identified the considerations which are relevant to characterizing a civil rights claim and to determining whether a state cause of action is analogous to that claim. Thus, even if a federal court is allowed to disregard a state's choice of limitations period where the state's choice is neither too short nor inconsistent with federal law, this Court should nevertheless review the decision below because it raises a critical question, which has not yet been addressed by this Court and which for years has divided the many circuits, namely "what considerations are relevant to the process of characterizing a civil rights claim for the purpose of selecting the most closely analogous cause of action and its applicable statute of limitations?" The circuits have failed to agree among themselves on the answer to this question, and their hopelessly conflicting decisions vary from circuit to circuit and sometimes even from panel to panel.

The First Circuit characterizes § 1983 claims for the purpose of selecting statutes of limitations on the basis of the underlying facts of each case and the type of relief sought, analogizing each action to a specific common law tort. *Gashgai v. Leibowitz,* 703 F.2d 10 (1st Cir. 1983) (alleged state deprivation of reputation and ability to practice medicine most analogous to defamation and "false light" invasion of privacy); *Burns v. Sullivan,* 619 F.2d 99, 106 (1st Cir.), *cert. denied,* 449 U.S. 893 (1980); *see also, Holden v. Commission Against Discrimination,* 671 F.2d 30 (1st Cir.), *cert. denied,* 459 U.S. 843 (1982).

The Second Circuit, on the other hand, characterizes § 1983 claims as actions on a liability created by statute. *Pauk v. Board of Trustees,* 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied,* 455 U.S. 1000 (1982). The court in *Pauk* refused to find § 1983 claims analogous to common law torts, stating that "[w]hile some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is 'significantly different from' state torts. . . ." *Id.* (quoting *Monroe v. Pape,* 365 U.S. 167, 196 (1961) (Harlan, J., concurring)). In the absence of a limitations period specifically applicable to statutory actions, however, the Second Circuit has applied the limitations period applicable to actions for personal injuries. *Williams v. Walsh,* 558 F.2d 667, 670 (2d Cir. 1977).

The Third Circuit examines "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged . . . 'within the scheme created by the various state statutes of limitations.'" *Aitchison v. Raffiani,* 708 F.2d at 101 (quoting *Davis v. United States Steel Supply,* 581 F.2d 335, 337 (3d Cir. 1978)) (applying New Jersey Tort Claims Act two-year limitations). Thus,

the Third Circuit defines the federal cause of action in terms of factually similar state actions as set out in various state limitations schemes.

The Fourth Circuit for the most part follows the approach adopted below and characterizes all § 1983 actions as actions for personal injuries. *Almond v. Kent,* 459 F. 2d 200 (4th Cir. 1972). In cases filed in federal courts sitting in North Carolina, however, the Fourth Circuit applies the state period of limitations applicable to actions for liability created by statute. *Cole v. Cole,* 633 F.2d 1083, 1092 (4th Cir. 1980).

The Fifth Circuit depends "substantially on state law in categorizing the essential nature of the claim presented. . . ." *Shaw v. McCorkle,* 537 F.2d at 1293. Thus, that court characterizes § 1983 claims by reference to similar state law actions. *See Morrell v. City of Picayune,* 690 F.2d 469 (5th Cir. 1982) (assault by police officer not governed by Mississippi one-year statute because under Mississippi law such is not mere assault and battery but breach of sheriff's official duty); *Lavellee v. Listi,* 611 F.2d 1129 (5th Cir. 1980) (Louisiana one-year assault statute of limitations applied in § 1983 action). The Fifth Circuit nonetheless concluded in an employment termination case that all § 1983 causes of action are essentially tortious in nature, refusing to apply to that case the period of limitations applicable to a state law action arising out of an employment contract. *Braden v. Texas A & M University System,* 636 F.2d 90, 92 (5th Cir. 1981). *See also Jones v. Orleans Parish School Board,* 688 F.2d 342 (5th Cir.) (employment termination claim under §§ 1981, 1983 held tortious in Louisiana), *cert. denied,* 103 S. Ct. 2420 (1983); *Moore v. El Paso County,* 660 P.2d 586 (5th

Cir. 1981) (same in Texas), *cert. denied,* 459 U.S. 822 (1982); *Rubin v. O'Koren,* 644 F.2d 1023 (5th Cir. 1981) (same in Alabama). Despite its holdings in these cases, however, the court did apply a state statute governing unwritten employment contracts to a § 1981 claim in *White v. United Parcel Service,* 692 F.2d 1 (5th Cir. 1982) (Mississippi), *cert. denied,* 104 S. Ct. 186 (1983). Unconstitutional employment termination is thus viewed as tortious in Texas, Alabama, and Louisiana, and contractual in Mississippi.

The Sixth Circuit's approach to characterizing civil rights claims varies according to available state statutes of limitations. In an employment discrimination suit in Michigan, the court stated that the essence of a § 1983 action is "a claim to recover damages for injury wrongfully done to the person." *Madison v. Wood,* 410 F.2d 564, 567 (6th Cir. 1969). In an employment discrimination suit in Ohio, however, the court applied the statute of limitations governing a liability created by statute. *Mason v. Owens-Illinois, Inc.,* 517 F.2d 520 (6th Cir. 1975). To add to the confusion, the Sixth Circuit, in *Kilgore v. City of Mansfield,* 679 F.2d 632 (6th Cir. 1982), refused to characterize a § 1983 action based on false arrest and malicious prosecution as an action on a liability created by statute, and instead applied to that case the limitations period governing factually similar common law torts.

The Seventh Circuit has attempted to adopt one limitations period to be uniformly applied to all civil rights claims. *Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977), *cert. denied,* 438 U.S. 907 (1978) (selecting limitations period applicable to statutory actions). That court, however, has found it impossible to do so given the differing statutes of limitations in various states. *See, e.g., Movement for Opportunity & Equality v. General Motors Corp.,* 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana two-year personal injury statute applied to § 1981 claim); *Sacks Brothers Loan Co. v. Cunningham,* 578 F.2d 172, 176 (7th Cir. 1978) (Indiana five-year statute governing actions against a public officer applied to § 1983 action against tax assessor).

The Eighth Circuit has explicitly rejected the approach, taken by several other circuits, of characterizing a claim based on its underlying facts, and holds that § 1983 actions are to be characterized as statutory actions. *Garmon v. Foust,* 668 F.2d 400 (8th Cir.) (en banc), *cert. denied,* 456 U.S. 998 (1982). The Eighth Circuit therefore applies to a § 1983 action either the state statute of limitations applicable to actions on a statute, or, if the state has no such statute, the state's residual limitations period. *Id.*

In the absence of a state-selected statute of limitations, *see Kosikowski,* the Ninth Circuit has applied to § 1983 actions the period of limitations applicable to actions for a liability created by statute. *Clark v. Musick,* 623 F.2d at 92. In states which have not enacted a limitations period specifically applicable to "actions on a statute," however, the Ninth Circuit has characterized a civil rights claim as a claim for injuries to the person. *Rose v. Rinaldi,* 654 F.2d 546 (9th Cir. 1981); *Shouse v. Pierce County,* 559 F.2d 1142, 1146-47 (9th Cir. 1977).

The Tenth Circuit, in its decision below, abandoned its previous policy of characterizing a civil rights action

in light of the underlying facts of the claim, *see Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380 (10th Cir. 1978), and *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), and adopted the approach that all § 1983 actions would be characterized, regardless of their underlying facts, as actions for injury to the person. 731 F.2d at 651. The Tenth Circuit thus will disregard more specific periods of limitations.

The Eleventh Circuit has followed the decisions of the Fifth Circuit handed down by that court as of September 30, 1981. *See Bonner v. City of Prichard*, 661 F. 2d 1206, 1207 (11th Cir. 1981) (en banc). Thus the Eleventh Circuit follows the Fifth Circuit's approach of characterizing civil rights claims by reference to available state statutes, drawing heavily on state law. *See McGhee v. Ogburn*, 707 F.2d 1312, 1315 (11th Cir. 1983).

The D.C. Circuit recently reviewed the disagreement among the circuits over whether state statutes governing common law torts are applicable to claims based on constitutional violations. *See McClam v. Barry*, 697 F.2d at 371-73. Although the court recognized that constitutional actions may "differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance," *id.* at 373, it held that these differences are not "a ground for rejecting as not closely analogous an otherwise identical common-law cause of action." *Id.* The court concluded that limitations periods promote factfinding accuracy and settled expectations, and observed that

> in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should select the claim most closely comparable to the federal claim with respect to factfinding accuracy and settled expectations. The comparison of any two claims will generally focus on the facts that must be litigated in trying them.

Id. at 374. The court therefore applied the one-year statute governing assault and battery to the plaintiff's constitutional claim against the defendant police officers.

In addition to the confusion reviewed above, the circuits are also divided in their attitudes toward a state's recognition of a specific limitations period for actions against governmental entities. *Compare Aitchison v. Raffiani, Morrell v. City of Picayune, Sacks Brothers Loan Co. v. Cunningham*, and *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) *with Pauk v. Board of Trustees, Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), and the decision of the court of appeals below, which rejected a statute of limitations applicable to "[a]ctions against a governmental entity or a public employee for torts." N.M. Stat. Ann. § 41-4-15 (1978).

Given the deep division of opinion among the circuits, it is clear that the question of what considerations are relevant to selecting the most analogous state action cannot be resolved without guidance from this Court. As the court of appeals stated before summarizing the conflicting decisions among the circuits,

> . . . the Supreme Court has been singularly unhelpful in providing guidance on this important issue of federal law. The Court has instructed us to borrow "the state law of limitations governing an analogous cause of action," *Tomanio*, 446 U.S. at 483-84, to "'adopt the local law of limitation,'" *Runyon v. McCrary*, 427 U.S. 160, 180 (1976) (quoting *Holmberg*

v. Armbrecht, 327 U.S. 392, 395 (1946)), and to apply "the most appropriate one provided by state law." *Johnson v. Railway Express Agency*, 421 U.S. at 462. Unfortunately, however, the Court has not addressed the issues that divide the circuits: what federal considerations are relevant to characterizing a civil rights claim and to determining whether a state limitations period is analogous or appropriate.

731 F.2d at 643.

In the face of congressional refusal to enact a uniform statute of limitations for § 1983 actions and the failure to achieve any consensus among the circuit courts of appeal regarding this question, it is critical that this Court come to grips with the problem. If this important question is not addressed by this Court, the circuits will continue to issue conflicting opinions, and litigants across the country will continue to be plagued by uncertainty and inconsistency.

CONCLUSION

The decision below violates established principles of federalism and creates an irreconcilable conflict between federal and state courts in New Mexico. Moreover, the Tenth Circuit's refusal to defer to state law conflicts with the decisions of other circuits and highlights the dispute, yet unaddressed by this Court, over the application of statutes of limitation selected by state law when the state limitations period is neither too short nor inconsistent with the Constitution and laws of the United States. Finally, the decision below raises an additional question of vital importance which has not yet been addressed by this

Court, namely "what considerations are relevant to the process of characterizing a civil rights claim for the purpose of selecting the most closely analogous cause of action and its applicable statute of limitation?" For the reasons stated above, Petitioner's request for a writ of certiorari to review the decision below should be granted.

Respectfully submitted,

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APPENDIX A

Gary GARCIA, Plaintiff-Appellee,

v.

Richard WILSON and Martin Vigil,
Defendants-Appellants.

Nos. 83-1017, 83-1018.

United States Court of Appeals,
Tenth Circuit.

March 30, 1984.

Section 1983 action was brought on basis of allegations that plaintiff's beating by state police officer was result of state police chief's gross negligence in failing to train, supervise, and discipline officer properly when he knew that officer had assaulted other county residents. Defendants moved to dismiss on ground of statute of limitations. The United States District Court for the District of New Mexico, Howard C. Bratton, Chief Judge, denied motion and certified issue for interlocutory appeal. The Court of Appeals, Seymour, Circuit Judge, held that: (1) for purposes of statute of limitations in § 1983 cases and, specifically, determining appropriate state limitations period to apply, all civil rights claims are to be generally, uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights, and (2) so characterizing the claims in the instant action, three-year New Mexico statute of limitations for actions brought for injury to the person or reputation of any person was applicable, and action was therefore timely.

Remanded.

1. Civil Rights—13.10

First step in selecting applicable state statute of limitations in federal civil rights action is to characterize essential nature of the federal action, which is matter of federal law; court must then determine which state limitations period is applicable to that characterization. 42 U.S.C.A. §§ 1983, 1988.

2. Federal Courts—424

Although federal courts are bound by the state's construction of its own statute of limitations, it is question of federal law whether particular statute, as construed by the state, is applicable to a federal claim.

3. Civil Rights—13.13(1)

To establish claim under § 1983, plaintiff must prove action under color of state law resulting in deprivation of constitutional or federal rights. 42 U.S.C.A. § 1983.

4. Civil Rights—13.1

Although § 1983 creates cause of action for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive right. 42 U.S.C.A. § 1983.

5. Action—2

Cause of action is established by showing existence of right held by the plaintiff and breach thereof by defendant, and it is distinct from remedy sought.

6. Civil Rights—13.10

For purposes of statute of limitations in § 1983 cases and, specifically, determining appropriate state limitations

period to apply, all civil rights claims are to be generally, uniformly characterized, regardless of discrete facts involved, as actions for injury to personal rights; overruling *Clulow v. Oklahoma*, 700 F.2d 1291; *Shah v. Halliburton Co.*, 627 F.2d 1055; *Zuniga v. Amfac Foods, Inc.*, 580 F.2d 380; *Spiegel v. School District No. 1*, 600 F.2d 264; *Hansbury v. Regents of the University of California*, 596 F.2d 944. 42 U.S.C.A. § 1983.

7. Civil Rights—13.10

For purposes of determining appropriate New Mexico limitations period to apply in § 1983 action based on allegations that plaintiff's beating by state police officer was result of state police chief's gross negligence in failing to train, supervise, and discipline the officer properly when he knew that officer had assaulted other county residents, claims would be characterized pursuant to rule announced in instant decision as actions for injury to personal rights; hence, applicable New Mexico statute was that providing three-year limitations period for actions for injuries to the person or reputation of any person. 42 U.S.C.A. § 1983; NMSA 1978, § 37-1-8.

Ben M. Allen of Rodey, Dickason, Sloan, Akin & Robb, Albuquerque, N. M. (John W. Cassell, Sp. Asst. Atty. Gen., Asst. Legal Advisor, New Mexico State Police, Santa Fe, N. M., filed a brief on behalf of defendant-appellant Vigil), for defendants-appellants.

Richard Rosenstock, Chama, N. M. (Steven G. Farber, Santa Fe, N. M., with him on the brief), for plaintiff-appellee.

Thomas L. Johnson of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, N. M., filed a brief for amicus curiae State of New Mexico.

Before SETH, Chief Judge, and HOLLOWAY, McWILLIAMS, BARRETT, DOYLE, McKAY, LOGAN and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

Gary Garcia brought these consolidated civil rights actions under 42 U.S.C. § 1983 (1976) against former New Mexico State Police Officer Richard Wilson, and State Police Chief Martin Vigil. Garcia alleged that his constitutional rights were violated when Wilson viciously beat him on his face and body with a "slapper" and then sprayed him with tear gas. Garcia further alleged that Vigil had improperly permitted Wilson to be hired as a State Police officer when Vigil knew or should have known that Wilson had previously been convicted of several serious crimes and when Vigil had been advised not to hire Wilson by two high ranking New Mexico State Police officers. Garcia also asserted that Vigil had been grossly negligent in failing to train, supervise, and discipline Wilson properly when he knew that Wilson had assaulted other county residents after he became a police officer.

Defendants moved to dismiss the action, asserting that the suit was barred by the statute of limitations. The district court denied the motion and certified the issue for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976).

The only issue before us is what limitations period should be applied to this section 1983 claim. We have determined to give en banc consideration to this case in

order to harmonize our decisions in this area, resolve any inconsistencies, and establish a uniform approach to govern resolution of this question in future cases.

I.

No statute of limitations is expressly provided for civil rights claims brought under section 1983. However, Congress has specifically directed us to look to state law in civil rights cases when federal law is deficient and the state law "is not inconsistent with the Constitution and laws of the United States." *See* 42 U.S.C. § 1988 (1976)[1] This admonition has been interpreted to mean that " 'the controlling period would ordinarily be the most appropriate one provided by state law.' " *Board of Regents v. Tomanio,* 446 U.S. 478, 485, 100 S.Ct. 1790, 1795, 64 L.Ed.2d 440 (1980) (quoting *Johnson v. Railway Express Agency,* 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975)).

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[1]Section 1988 provides:

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS', and of Title 'CRIMES', for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

42 U.S.C. § 1988 (Supp. V 1981).

[1,2] The first-step in selecting the applicable state statute of limitations is to characterize the essential nature of the federal action. *Knoll v. Springfield Township School District,* 699 F.2d 137, 140 (3d Cir. 1983); *Braden v. Texas A & M University System,* 636 F.2d 90, 92 (5th Cir. 1981); *Burns v. Sullivan,* 619 F.2d 99, 105 (1st Cir.), *cert. denied,* 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). Characterization of such a federal claim is a matter of federal law. *UAW v. Hoosier Cardinal Corp.,* 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Pauk v. Board of Trustees,* 654 F.2d 856, 865-66 & n. 6 (2d Cir. 1981), *cert denied,* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Zuniga v. Amfac Foods, Inc.,* 580 F.2d 380, 383 (10th Cir. 1978); *Williams v. Walsh,* 558 F.2d 667, 672 (2d Cir. 1977). The court must then determine which state limitations period is applicable to this characterization. *Braden,* 636 F.2d at 92; *Burns,* 619 F.2d at 105. Although the federal courts are bound by the state's construction of its own statutes of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a federal claim. *Knoll,* 699 F.2d at 141-42; *Pauk,* 654 F.2d at 866 n. 6.

There is little dispute that these fundamental principles govern the choice of a limitations period for civil rights claims. However, the courts vary widely in the methods by which they characterize a section 1983 action, and in the criteria by which they evaluate the applicability of a particular state statute of limitations to a particular claim. The actual process used to select an appropriate state statute varies from circuit to circuit and sometimes from panel to panel. *See, e.g., Garcia v. University of Kansas,* 702 F.2d 849 (10th Cir. 1983); *Garmon v. Foust,* 668 F.2d 400 (8th Cir.) (en banc), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977), *cert. denied,* 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978).

Given the varied factual circumstances producing civil rights violations and the diversity of state limitations statutes, it is not surprising that no uniform approach to this problem has developed. Moreover, the Supreme Court has been singularly unhelpful in providing guidance on this important issue of federal law. The Court has instructed us to borrow "the state law of limitations governing an analogous cause of action," *Tomanio,* 446 U.S. at 483-84, 100 S.Ct. at 1794-95, to "'adopt the local law of limitation,'" *Runyon v. McCrary,* 427 U.S. 160, 180, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415 (1976) (quoting *Holmberg v. Armbrecht,* 327 U.S. 392, 395, 66 S.Ct. 582, 90 L.Ed. 743 (1946)), and to apply "the most appropriate one provided by state law." *Johnson v. Railway Express Agency,* 421 U.S. at 462, 95 S.Ct. at 1721. Unfortunately, however, the Court has not addressed the issues that divide the circuits: what federal considerations are relevant to characterizing a civil rights claim and to determining whether a state limitations period is analogous or appropriate.

In the face of Congressional refusal to enact a uniform statute and the Supreme Court's failure to come to grips with the problem, it is imperative that we establish a consistent and uniform framework by which suitable statutes of limitations can be determined for all section 1983 claims in this circuit. In so doing, we must be mindful of the broad remedial purposes of this civil rights legislation. *See Childers v. Independent School District No. 1,* 676 F.2d 1338, 1342-43 (10th Cir. 1982). However, the Supreme Court has clearly stated that the policies of certainty and repose embodied in statutes of limitations

are not inconsistent with the purposes of section 1983 and are therefore not to be disfavored in civil rights cases. *See Tomanio,* 446 U.S. at 487-89, 100 S.Ct. at 1796-97. With these considerations in mind, we begin our analysis by examining the approaches adopted by other circuits.

A. First Circuit

The First Circuit has characterized a section 1983 claim alleging the unconstitutional termination of public employment as sounding in tort, and has applied the Puerto Rican statute governing general tort suits to such a claim. *See Ramirez de Arellano v. Alvarez de Choudens,* 575 F.2d 315 (1st Cir. 1978); *Graffels Gonzalez v. Garcia Santiago,* 550 F.2d 687 (1st Cir. 1977). However, in a subsequent case in Massachusetts, the court disregarded this characterization and chose instead to apply a state statute giving public employees six months to file an unlawful employment action in state court. The court stated that the statute was "specifically tailored to deal with the plaintiff's cause of action." *Burns v. Sullivan,* 619 F.2d 99, 106 (1st Cir.), *cert. denied,* 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980); *see also Holden v. Commission Against Discrimination,* 671 F.2d 30 (1st Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982).[2]

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[2]The court in *Burns* reasoned that failure to apply the six-month limitations period governing discrimination claims filed under state law would allow plaintiffs to bypass the state administrative proceedings and bring their claim in federal court. 619 F.2d at 107. Subsequent to the *Burns* decision, the Supreme Court clearly stated that this rationale is not relevant to determining limitations periods for the separate and independent remedies provided by sections 1981 and 1983. *See Board of*

(Continued on following page)

In a recent case involving professional disciplinary proceedings in Maine, the First Circuit analogized plaintiff's section 1983 claim to various specific common law torts based on the underlying facts and the relief sought. *See Gashgai v. Leibowitz,* 703 F.2d 10 (1st Cir. 1983) (alleged state deprivation of reputation and ability to practice medicine most analogous to defamation and "false light" invasion of privacy). The court adopted this approach without discussion, notwithstanding its arguable inconsistency with earlier cases. Thus, in *Walden, III, Inc. v. Rhode Island,* 576 F.2d 945, 947 (1st Cir. 1978), the court refused to analogize the plaintiff's claim to a specific tort, remarking:

> "While for purposes of deciding this case we need not rule finally on the appropriateness of ever referring to more than one statute of limitations should a precisely analogous state claim indisputably have a different limitations period, *it is obviously preferable that one statute of limitations, such as that provided for torts, apply generally to most if not all § 1983 actions arising in a particular jurisdiction.*"

Id. at 947 (emphasis added).

B. Second Circuit

The Second Circuit recently affirmed its earlier decisions characterizing all section 1983 claims as actions on a

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Regents v. Tomanio, 466 U.S. 478, 489-91, 100 S.Ct. 1790, 1797-98, 64 L.Ed.2d 440 (1980). The First Circuit has nonetheless continued to follow the *Burns* analysis. *See Holden v. Commission Against Discrimination,* 671 F.2d 30, 33 & n. 3 (1st Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 97, 74 L.Ed.2d 88 (1982); *Hussey v. Sullivan,* 651 F.2d 74, 75-76 (1st Cir. 1981). To the extent that these cases are based on the ground rejected in *Tomanio,* they are unpersuasive.

liability created by statute. *Pauk v. Board of Trustees,* 654 F.2d 856, 866 (2d Cir. 1981), *cert. denied,* 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). The court refused to find section 1983 claims analogous to common law torts, stating that "[w]hile some § 1983 claims have counterparts in actions at common law, the constitutional tort remedied by § 1983 is 'significantly different from' state torts . . . ." *Id.* (quoting *Monroe v. Pape,* 365 U.S. 167, 196, 81 S.Ct. 473, 488, 5 L.Ed.2d 492 (1961) (Harlan, J., concurring)). The court also rejected application of state statutes governing suits to recover for the tortious conduct of public employees, concluding that "[i]t would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights." *Id.* 654 F.2d at 862. The court pointed out that applying statutes governing actions on liability created by statute to all section 1983 claims provides uniformity in approach and is consistent with the broad remedial purposes of the civil rights acts. *Id.* at 866.

C. Third Circuit

The Third Circuit applies "the limitation . . . which would be applicable in the courts of the state in which the federal court is sitting had an action seeking similar relief been brought under state law." *Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (en banc) (applying Pennsylvania one-year statute to § 1983 claims analogous to false arrest, and two-year wrongful injury statute to claims analogous to assault and battery and coercion of guilty plea); *see also Meyers v. Pennypack Woods Home Ownership Association,* 559 F.2d 894, 900 (3d Cir. 1977). The court examines "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged . . . 'within the scheme created by the various state statutes of limitations.'" *Aitchison v. Raffiani,* 708 F.2d 96, 101 (3d Cir. 1983) (quoting *Davis v. United States Steel Supply,* 581 F.2d 335, 337 (3d Cir. 1978) (applying New Jersey Tort Claim Act two-year limitations).) Thus the Third Circuit defines the federal cause of action in terms of factually similar state actions as set out in various state limitations schemes.

D. Fourth Circuit

In characterizing the nature of a section 1983 cause of action, the Fourth Circuit has stated that

> "[i]n essence, § 1983 creates a cause of action where there has been injury, under color of state law, to the person or to the constitutional or federal statutory rights which emanate from or are guaranteed to the person. In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'"

Almond v. Kent, 459 F.2d 200, 204 (4th Cir. 1972). Accordingly, the court in *Almond* applied the Virginia statute governing personal injuries to the plaintiff's claim against the sheriff and state police "not because there was a right of recovery at common law but because there was a violation of a constitutional right not to be beaten." *Id.* at 203-04. Citing *Monroe v. Pape,* 365 U.S. at 196, 81 S.Ct. at 488, the court held the alleged constitutional violation to be "more important than those transitory torts for which a one-year period is prescribed." *Id.* 459 F.2d at 204.

The court subsequently applied a West Virginia two-year personal injury statute rather than a five-year contract statute to a high school principle's allegation under sections 1981 and 1983 that his discharge was unconstitutional. *McCausland v. Mason County Board of Education,* 649 F.2d 278 (4th Cir.), *cert. denied,* 454 U.S. 1098, 102 S.Ct. 671, 70 L.Ed.2d 639 (1981). The court pointed out that "to demonstrate the required constitutional basis for his federal complaint he must allege personal injury transcending contract rights." *Id.* at 279. The court also relied on the *Almond* analysis in rejecting a state statute expressly applicable to section 1983 actions. *See Johnson v. Davis,* 582 F.2d 1316, 1319 (4th Cir. 1978). Noting that the Virginia statute limiting section 1983 actions was shorter than that applicable to personal injuries, the court concluded that the special limitations period undervalued the constitutional values at stake, and unreasonably discriminated against the "constitutional tort remedy." *Id.*

Notwithstanding the Fourth Circuit's otherwise consistent characterization of section 1983 as creating a cause of action for injury to personal rights, the court applies the state limitations for liability created by statute to all section 1983 claims arising in North Carolina. *See Cole v. Cole,* 633 F.2d 1083, 1092 (4th Cir. 1980) (constitutional claims arising out of false arrest and abuse of process); *Bireline v. Seagondollar,* 567 F.2d 260, 263 (4th Cir. 1977) (allegedly discriminatory employment termination of state university instructor), *cert. denied,* 444 U.S. 842, 100 S.Ct. 83, 62 L.Ed.2d 54 (1979).

E. Fifth Circuit

Two lines of cases have developed in the Fifth Circuit using different methods for selecting the most analogous

state limitations period. *See Shaw v. McCorkle,* 537 F.2d 1289, 1292 (5th Cir. 1976). One method uses the generally accepted two-step process in which the court first characterizes the essential nature of the federal claim and then determines, according to state law, which state period would apply to a state claim similar to the federal characterization. *Id.* "A second line of cases formulates a more direct method of selection, asking simply which state limitations period the state itself would have enforced had plaintiff brought an action seeking similar relief in a court of that state." *Id.* The court in *Shaw* concluded that these approaches are not inconsistent because they "in fact depend substantially on state law in catagorizing the essential nature of the claim presented . . . ." *Id.* at 1293. In keeping with this conclusion, the court has characterized section 1983 claims by reference to similar state law actions. *See Morrell v. City of Picayne,* 690 F.2d 469 (5th Cir. 1982) (assault by police officer not governed by Mississippi one-year statute because under Mississippi law such is not mere assault and battery but, breach of sheriff's official duty); *Lavelle v. Listi,* 611 F.2d 1129 (5th Cir. 1980) (Louisiana one-year assault statute of limitations applied in § 1983 action).

Although noting its holding in *Shaw* that federal courts draw heavily on state law in catagorizing civil rights claims, the court nevertheless concluded in an employment termination case that all section 1983 causes of action are essentially tortious in nature. *Braden v. Texas A & M University System,* 636 F.2d 90, 92 (5th Cir. 1981). The plaintiff in *Braden* alleged that his discharge deprived him of liberty and property interests without due process. The court refused to analogize this claim to a state law action arising out of an employment contract, concluding

that "[l]iability is imposed for subjecting a person to the deprivation of rights secured by the Constitution and laws of the United States, not for breach of contract." *Id.* Accordingly, the court applied state limitations periods governing tort actions for injury to the person of another and actions for trespass to or conversion of property.

Although the circuit subsequently employed the analysis set out in *Braden, see Jones v. Orleans Parish School Board,* 688 F.2d 342 (5th Cir.) (employment termination claim under §§ 1981, 1983 held tortious in Louisiana), *cert. denied,* — U.S .—, 103 S.Ct. 2420, 77 L.Ed.2d 1310 (1982); *Moore v. El Paso County,* 660 F.2d 586 (5th Cir. 1981) (same in Texas), *cert. denied,* — U.S. —, 103 S.Ct. 51, 74 L.Ed.2d 57 (1982); *Rubin v. O'Koren,* 644 F.2d 1023 (5th Cir. 1981) (same in Alabama), is nonetheless applied a state statute governing unwritten employment contracts to a section 1981 claim in *White v. United Parcel Service,* 692 F.2d 1 (5th Cir. 1982) (Mississippi). Unconstitutional employment termination is thus viewed as tortious in Texas, Alabama, and Louisiana, and contractual in Mississippi.

F. Sixth Circuit

The Sixth Circuit's approach to characterizing civil rights claims has varied according to available state statuates of limitations. In an employment discrimination suit in Michigan, the court stated that the essence of a section 1983 action is "a claim to recover damages for injury wrongfully done to the person." *Madison v. Wood,* 410 F.2d 564, 567 (6th Cir. 1969). The court said that "'[t]he Fourteenth Amendment protects the most fundamental personal rights and liberties guaranteed to any citizen of the United States. When one is deprived of his civil rights,

it is clear that the injury is to his person . . . .'" *Id.* (quoting *Krum v. Sheppard,* 255 F.Supp. 994, 997 (W.D.Mich. 1966)).

In subsequent employment discrimination suits, however, the court has applied state statutes governing a liability created by statute. *See Mason v. Owens-Illinois, Inc.,* 517 F.2d 520 (6th Cir. 1975) (Ohio); *Garner v. Stephens,* 460 F.2d 1144 (6th Cir. 1972) (Kentucky). The court justified this result in *Garner* by pointing out that the state court had limited application of the personal injury limitations statute to claims involving physical injuries. *Id.* at 1146-47. Elsewhere the court has expressly refused to characterize section 1983 suits based on false arrest and malicious prosecution as actions on a liability created by statute, and has applied instead the limitations governing factually similar common law torts. *See Kilgore v. City of Mansfield,* 679 F.2d 632, 634 (6th Cir. 1982) (Ohio); *Carmicle v. Weddle,* 555 F.2d 554, 555 (6th Cir. 1977) (Kentucky).

G. Seventh Circuit

Resolving a split on the issue, the Seventh Circuit held that a limitations period for section 1983 actions should not be selected by analogizing the facts underlying the claim to traditional common law torts. *Beard v. Robinson,* 563 F.2d 331, 336-37 (7th Cir. 1977), *cert. denied,* 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978). In *Beard* the court applied the Illinois limitations statute applicable to statutory causes of action, stating:

> "By following the *Wakat* [*v. Harlib,* 253 F.2d 59 (7th Cir. 1958),] approach of applying a uniform statute of limitations, we avoid the often strained

process of characterizing civil rights claims as common law torts, and the

> '[i]nconsistency and confusion [that] would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several different periods of limitation applicable to each state-created right were applied to the single federal cause of action.' *Smith v. Cremins,* [308 F.2d 187] at 190 [(9th Cir. 1962)]."

Id. at 337.

Although the court indicated that one limitations period should uniformly be applied to all civil rights claims, the court has found it impossible to do so given the differing statutes of limitations in other states. *See, e.g., Movement for Opportunity & Equality v. General Motors Corp.,* 622 F.2d 1235, 1242-43 (7th Cir. 1980) (Indiana two-year personal injury statute applied to § 1981 claim); *Sacks Brothers Loan Co. v. Cunningham,* 578 F.2d 172, 176 (7th Cir. 1978) (Indiana five-year statute governing actions against a public officer applied to § 1983 action against tax assessor).

H. Eighth Circuit

The Eighth Circuit also developed two inconsistent lines of cases. One line analogized civil rights cases to similar common law torts. *See, e.g., Johnson v. Dailey,* 479 F.2d 86 (8th Cir. 1973) (Iowa two-year personal injury statute applied to § 1983 claim analogous to malicious prosecution action), *cert. denied,* 414 U.S. 1009, 94 S.Ct. 371, 38 L.Ed.2d 246 (1973). The other line held that such an analogy is improper because a civil rights claim is fundamentally different from a common law tort. *See, e.g., Lamb v. Amalgamated Labor Life Insurance Co.,* 602 F.2d

155 (8th Cir. 1979) (Missouri five-year statute governing liability created by statute applied to § 1983 claim alleging conspiracy to deprive plaintiff of constitutional rights); *Glasscoe v. Howell,* 431 F.2d 863 (8th Cir. 1970) (Arkansas three-year statute governing liability created by statute, or five-year general statute applies to a § 1983 action against police, rather than one-year statute for assault and battery or false imprisonment).

The court addressed this inconsistency in *Garmon v. Foust,* 668 F.2d 400 (8th Cir. 1982) (en banc), *cert. denied,* 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982), and rejected

> "the tort analogy because it unduly cramps the significance of section 1983 as a broad, statutory remedy. Section 1983 provides a cause of action for deprivation of civil rights that in no way depends upon state common law. A litigant may pursue a section 1983 action rather than, or in addition to, state remedies."

Id. at 406. The court based its determination on its conclusion that "'a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.'" *Id.* (quoting *Monroe v. Pape,* 365 U.S. at 196, 81 S.Ct. at 488 (Harlan, J., concurring)).

I. Ninth Circuit

The Ninth Circuit, in an often quoted opinion, also has concluded that common law tort analogies are not appropriate because the elements of a common law tort are not the same as the elements establishing a cause of action

under section 1983. *See Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962) (California). In keeping with this conclusion, the Ninth Circuit almost consistently has characterized claims under sections 1981 and 1983 as actions on a liability created by statute. *See, e.g., Plummer v. Western International Hotels Co.*, 656 F.2d 502, 506 (9th Cir. 1981) (Oregon, § 1981); *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 663 (9th Cir. 1980) (California, § 1981); *Clark v. Musick*, 623 F.2d 89, 92 (9th Cir. 1980) (Oregon, § 1983). *Tyler v. Reynolds Metals Co.*, 600 F.2d 232, 234 (9th Cir. 1979) (Arizona, § 1981).

The one exception to the Ninth Circuit's uniform approach is *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981), in which the court adopted a state limitations period expressly applicable to section 1983 claims brought in state court. The court stated that

> "[t]his precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980). Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest."

Id. at 107.

J. Eleventh Circuit

The Eleventh Circuit has adopted as precedent the decisions of the Fifth Circuit handed down by that court as of September 30, 1981. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). Thus the

Eleventh Circuit follows the Fifth Circuit's approach of characterizing civil rights claims by reference to available state statutes, drawing heavily on state law. *See McGhee v. Ogburn*, 707 F.2d 1312, 1315 (11th Cir. 1983).

K. D.C. Circuit

The D.C. Circuit recently addressed the disagreement among the circuits over whether state statutes governing common law torts are applicable to claims based on constitutional violations. *See McClam v. Barry*, 697 F.2d 366, 371-73 (D.C. Cir. 1983). The court recognized that constitutional actions may "differ from closely analogous common-law claims in the interests they protect, in their elements and origins, and in their importance." *Id.* at 373. However, it held that these differences are not "a ground for rejecting as not closely analogous an otherwise identical common-law cause of action." *Id.* The court concluded that limitations periods promote factfinding accuracy and settled expectations, and observed that

> "in determining what claim (among those for which a state limitations period is specified) is most closely analogous to a given federal claim, a court should select the claim most closely comparable to the federal claim with respect to factfinding accuracy and settled expectations. *The comparison of any two claims will generally focus on the facts that must be litigated in trying them.*"

Id. at 374 (emphasis added). It then applied the one year statute governing assault and battery to the plaintiff's constitutional claim against the defendant police officers.

The court's decision in *McClam* is based on its assumption that the facts establishing the elements peculiar to the constitutional cause of action are simple to prove.

Id. at 374 n. 7. The *McClam* court therefore reasoned that these elements do not render the constitutional claim so different from the comparable state cause of action that the particular state statute of limitations is inappropriate for a section 1983 action.

II.

The fundamental point of disagreement in selecting a statute of limitations for civil rights actions is whether such claims should be characterized in terms of the specific facts generating a particular suit, or whether a more general characterization of such claims should be applied regardless of the discrete facts involved. Our past practice usually has been to characterize the section 1983 claim according to its underlying specific facts. *See, e.g., Clulow v. Oklahoma,* 700 F.2d 1291, 1299 (10th Cir. 1983); *Shah v. Halliburton Co.,* 627 F.2d 1055, 1059 (10th Cir. 1980); *Zuniga v. Amfac Foods, Inc.,* 580 F.2d 380, 383-87 (10th Cir. 1978). However, we have also variously characterized a section 1983 action alleging wrongful discharge or refusal to hire as a liability created by statute, *Spiegel v. School District No. 1,* 600 F.2d 264, 265-66 (10th Cir. 1979), as contractual in nature, *Hansbury v. Regents of the University of California,* 596 F.2d 944, 949 n. 15 (10th Cir. 1979), and as a noncontractual injury to the rights of another, *Garcia v. University of Kansas,* 702 F.2d 849, 850-51 (10th Cir. 1983). As more fully explained below, we decide today to adopt a general characterization for all civil rights claims based on our perception of the nature of such claims, and our conviction that this approach will ultimately best effectuate the purposes of both the civil rights acts and statutes of limitations.

We cannot accept the analysis used by the D.C. Circuit in *McClam* to support comparing civil rights actions to factually similar state court suits. *McClam* rests on two assumptions that the D.C. Circuit took to be true in the majority of cases. The court assumed first that the facts required to establish the elements of a federal claim are easy to prove, and that the federal claim therefore is not sufficiently distinct from a comparable state cause of action to warrant the application of a different statute of limitations. The court further assumed that state statutes of limitations are concerned primarily with factfinding certainty and settled expectations. While both of these assumptions may sometimes be true, they are not true sufficiently often to justify adopting an approach that itself creates substantial problems.

[3] To establish a claim under section 1983, a plaintiff must prove action under color of state law resulting in the deprivation of constitutional or federal rights. The court in *McClam* believed that whether a defendant acted in an official capacity is usually a simple factual matter. *Id.* 697 F.2d at 374 n. 7. Even accepting this generalization as valid, *but cf. Gilmore v. Salt Lake Community Action Program,* 710 F.2d 632, 635-39 (10th Cir. 1983), the facts establishing a constitutional or statutory deprivation frequently are complex and peculiarly within the knowledge of the defendant. *See, e.g., Miller v. City of Mission,* 705 F.2d 368 (10th Cir. 1983); *Clulow v. Oklahoma,* 700 F.2d 1291; *Key v. Rutherford,* 645 F.2d 880 (10th Cir. 1981). The plaintiff need not prove such facts to recover in a state law action. We conclude that the evidence necessary to support a section 1983 claim is so often significantly distinct from the facts at issue in an arguably analogous

state cause of action that the differences cannot be dismissed as unimportant. Accordingly, a state's determination that a state claim should be governed by a particular limitations period to ensure accuracy in the factfinding process is not necessarily applicable to a federal claim arising out of the same incident but resting on different elements involving proof of different facts.

While we agree with the court's premise in *McClam* that the state's judgment in setting limitations periods is typically concerned with factfinding accuracy and settled expectations, those purposes are not the only ones motivating the enactment of such statutes. Limitations periods specifically applicable to suits against state and local officials may well be motivated by a legislative desire to limit the liability of the public entity employer in conjunction with a waiver of sovereign immunity. As the Second and Fourth Circuits have pointed out, borrowing such limitations periods is not consistent with the remedial purpose of section 1983. *See Pauk v. Board of Trustees*, 654 F.2d at 862; *Johnson v. Davis*, 582 F.2d at 1319. Thus, unlike the Ninth Circuit in *Kosikowski v. Bourne*, 659 F.2d at 107, we are unwilling to hold that a state's articulation of the limitations period specifically applicable to section 1983 claims is determinative of the federal issue and relieves the federal courts from characterizing a civil rights claim as a matter of federal law.

Attempting to compare civil rights claims with particular state law actions creates other problems that are clearly revealed by our own experience and by our examination of the results of this approach in other circuits. Virtually any section 1983 claim is arguably analogous to more than one state cause of action. *See, e.g., Clulow,*

700 F.2d at 1299-1300; *Shah*, 627 F.2d at 1057-59. Thus, attempting to determine which state claim is most nearly comparable is an uncertain task with no definitive answer. In the First Circuit, for example, a section 1983 cause of action founded on employment discrimination is tortious in Puerto Rico, *see Ramirez de Arellano v. Alvarez de Choudens*, 575 F.2d at 318-19, but does not sound in tort in Massachusetts simply because the state limitations scheme is different there, *see Burns v. Sullivan*, 619 F.2d at 105-07. The Fifth Circuit has characterized unconstitutional employment discrimination both as a tortious injury to the rights of another, *see Braden v. Texas A & M University System*, 636 F.2d at 93, and as an action on an unwritten contract, *see White v. United Parcel Service*, 692 F.2d at 2-3. As noted above, we have characterized a section 1983 employment discrimination claim three different ways in this circuit in *Spiegel, Hansbury* and *Garcia*. This anomaly is the predictable outcome of characterizing the federal claim by deferring to the state court's treatment of a state claim seeking similar relief. Variations in state law and factual distinctions often become dispositive even though they are irrelevant to the elements of the constitutional cause of action.

The resulting uncertainty encourages both parties to argue the state factual analogy favorable to their respective positions at every stage of the proceedings with a justifiable hope of success. Consequently, describing the federal cause of action in terms of state law claims does not promote settled expectations and repose, but instead encourages voluminous litigation that is collateral to the merits and consumes scarce judicial resources. Moreover, as pointed out above, this approach results in the unequal

treatment of similar claims. Such uneven application may cause the losing party to infer that the choice of a limitations period in his case was result oriented, thereby undermining his belief that he has been dealt with fairly. This objectionable possibility is particularly undesirable in the context of socially sensitive civil rights litigation. In sum, we conclude that the arguments in favor of this approach are not persuasive in view of its disadvantages. All of the federal values at issue in selecting a limitations period for section 1983 claims are best served by articulating one uniform characterization describing the essential nature underlying all such claims.

[4] Those courts adopting this latter approach have characterized the fundamental nature of civil rights claims as either actions on a liability created by statute, or actions for injury to the rights of another. *Compare, e.g., Pauk v. Board of Trustees,* 654 F.2d at 866, *with Almond v. Kent,* 459 F.2d at 203-04. Although section 1983 creates a cause of action for violations of constitutional rights, it is solely a procedural statute which does not itself grant any substantive rights. *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). "[O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Id.,* 441 U.S. at 617, 99 S.Ct. at 1915. The remedy provided by section 1983 is statutory in origin, but the underlying liability it enforces stems primarily from the Constitution. It is thus analytically inaccurate to characterize section 1983 as a

liability created by statute[3] *But cf. Pauk v. Board of Trustees,* 654 F.2d at 861-66. We believe the appropriate focus should not be on the remedy but on the elements of the cause of action, because they most fully describe the essence of the claim.

[5, 6] A cause of action is established by showing the existence of a right held by the plaintiff and a breach of that right by the defendant, and is distinct from the remedy sought. *Williams v. Walsh,* 558 F.2d 667, 670-71 (2d Cir. 1977). The elements of a section 1983 claim are the deprivation of rights secured by the Constitution or federal law, and action occurring under color of state law. These rights have been described as inhering "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law." *Walden, III, Inc. v. Rhode Island,* 576 F.2d 945, 946 (1st Cir. 1978) (quoting *Commerce Oil Refining Corp. v. Miner,* 98 R.I. 14, 199 A.2d 606 (1964)). "In the broad sense, every cause of action under § 1983 which is well-founded results from 'personal injuries.'" *Almond v. Kent,* 459 F.2d at 204. "[T]he cause of action is in essence delictual." *Braden v. Texas A & M University System,* 636 F.2d at 92. We agree with these views. Accordingly, we conclude that every section 1983 claim is in essence an action for injury to personal rights. Henceforth, all section 1983 claims in this circuit will be uniformly so characterized for statute

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[3] We note moreover that not every state has a statute of limitations applicable to a liability created by statute. Where no such statute exists, a court may be forced to fall back on the very process of case-by-case characterization and analogizing that we have rejected today. *See, e.g., Movement for Opportunity & Equality v. General Motors Corp.,* 622 F.2d at 1242-43, and the text *supra* at 646-647.

of limitations purposes.[4] To the extent that our prior decisions are inconsistent with the analysis we adopt today, they are hereby overruled.

III.

[7] The incident giving rise to the cause of action before us allegedly took place on April 27, 1979. Garcia filed suit on January 28, 1982, approximately two years and nine months later. Defendants contended below that the action is governed by the two-year limitations period contained in the New Mexico Tort Claims Act, N.M.Stat. Ann. § 41-4-15(A)(1978), and that Garcia's suit therefore was not timely filed. In a thorough and thoughtful opin-

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[4]The Supreme Court has addressed the issue of uniformity as a goal in determining the proper statute of limitations in civil rights cases by stating that " 'in the areas to which § 1988 is applicable Congress has provided direction, indicating that state law will often provide the content of the federal remedial rule. This statutory reliance on state law obviously means that there will *not be nationwide uniformity on these issues.*' " *Board of Regents v. Tomanio*, 446 U.S. at 489, 100 S.Ct. at 1797 (quoting *Robertson v. Wegmann*, 436 U.S. 584, 594 n. 11, 98 S.Ct. 1991, 1997 n. 11, 56 L.Ed.2d 554 (1978)) (emphasis added). We do not read this statement as contrary to our determination that uniformity in the characterization of federal civil rights claims is a commendable goal. Uniformity of characterization will not result in one limitations period beng applied to all civil rights cases regardless of the state in which they arose. Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state, depending on state law. *Within* each state, however, the most appropriate statute of limitations will be applied to all § 1983 claims brought within that state. Other circuits have agreed with us that the interest in attaining this limited uniformity is an important one. *See Pauk v. Board of Trustees*, 654 F.2d 856, 862 (2d Cir. 1981); *Walden, III, Inc. v. Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978); *Beard v. Robinson*, 563 F.2d 331, 337 (7th Cir. 1977); *Smith v. Cremins*, 308 F.2d 187, 190 (9th Cir. 1962).

ion, the district court concluded that section 1983 claims should be uniformly characterized as actions based on a statute. Because there is no New Mexico statute governing actions on a liability created by statute, the court applied the four-year residual limitations period found in N.M.Stat.Ann § 37-1-4 (1978).

In keeping with our holding in Part II that section 1983 claims are in essence actions to recover for injury to personal rights, we conclude that the appropriate limitations period is that found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years."[5] Accordingly, Garcia's suit was timely filed.

The case is remanded for further proceedings consistent with this opinion.

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[5]In reaching this conclusion, we note the New Mexico Supreme Court's holding in *DeVargas v. New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982), that the limitations period provided in the New Mexico Tort Claims Act governs § 1983 suits filed against state police officers in state court. Although state courts have concurrent jurisdiction with us over § 1983 actions, *see Martinez v. California*, 444 U.S. 277, 283 n. 7, 100 S.Ct. 553, 558 n. 7, 62 L.Ed.2d 481 (1980), the characterization of a § 1983 claim for statute of limitations purposes is nonetheless a question of federal law, as we have noted supra at 643. Because the conclusion reached in *DeVargas* is at variance with our analysis in this case, we do not adopt it.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV NO. 82-092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants.

MEMORANDUM OPINION

(Filed July 21, 1982)

This matter comes before the Court on defendants' motion to dismiss plaintiff's action for failure to state a cause of action upon which relief can be granted. F.R.Civ. P.12(b)(6). As grounds therefor, defendants claim that plaintiff's action is barred as untimely filed by the applicable statute of limitations.[1]

The plaintiff, Gary Garcia, brings this action under 42 U.S.C. § 1983 against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police, in their individual capacities. He seeks money damages to compensate him for the alleged deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United

[1]Should the Court deny defendants' motion to dismiss based on the statute of limitations, defendants alternatively move the Court to enter an Order certifying an immediate interlocutory appeal on this issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. § 1292(b).

States Constitution, and for the personal injuries he allegedly suffered as a result of the acts and omissions of the defendants acting under color of state law. Specifically, plaintiff alleges that he was unlawfully and severely beaten and sprayed with tear gas by defendant Wilson. He also alleges that defendant Vigil improperly allowed defendant Wilson to be hired as a New Mexico State Police Officer and thereafter failed to properly and adequately discipline, train and control Wilson, thereby directly causing the injuries and violations of civil rights suffered by plaintiff.

The incident in question allegedly took place on April 27, 1979. This lawsuit was filed on January 28, 1982, more than two years later. If, as defendants urge, the two year statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat.Ann. § 41-4-15(A)(1978), governs this cause of action, plaintiff's action is barred as untimely filed.

In addition to the two year statute of limitations being urged on the Court by defendants, there are two other statutes of limitations available under New Mexico law which might also be applied to a § 1983 action. N.M.Stat. Ann. § 37-1-8 (1978) provides a three year statute of limitations for actions for an injury to a person or the reputation of any person; N.M.Stat.Ann. § 37-1-4 provides a four year statute of limitations for actions founded upon accounts, unwritten contracts, injuries to property, conversion of personal property, fraud and all other actions not otherwise provided for. Applications of either of those statutes of limitations would allow plaintiff's suit to continue.

The problem of choosing from among three possible New Mexico statutes of limitations arises because the Civil Rights Act of 1871, codified in 42 U.S.C. § 1983, does not contain its own statute of limitations. The Court must therefore adopt the most appropriate statute of limitations governing an analogous state cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975);[2] *Spiegel v. School District No. 1, Laramie County*, 600 F.2d 264, 265 (10th Cir. 1979). The Civil Rights Act specifically provides for this borrowing procedure[3] and the Supreme Court has mandated its use. *E.g., Robertson v. Wegmann*, 436 U.S. 584 (1978).

[2] In *Johnson*, the Supreme Court stated:

> Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones . . . . In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a *closely analogous* claim. (emphasis added).

421 U.S. at 463-64.

[3] 42 U.S.C. § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent

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Characterizing § 1983 actions is a matter of federal law. *Clark v. Musick*, 623 F.2d 89 (9th Cir. 1980) (*per curiam*); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Johnnie K. v. County of Curry*, No. 81-914-M (D. N.M. April 15, 1982). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 706 (1966). Once the § 1983 claim has been characterized, the statute of limitations of the most closely analogous state cause of action will be applied to the § 1983 action unless application thereof would be inconsistent with either "the Constitution and laws of the United States," *Board of Regents v. Tomanio*, 466 U.S. at 485, or "the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. at 465; *Spiegel*, 600 F.2d at 265-66. See also *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355, 367 (1977).

There are no clear guidelines from the Supreme Court indicating what factors federal courts should consider in characterizing § 1983 actions. Some courts have focused on the underlying conduct of the defendant in the § 1983

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> with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

claim and have attempted to draw analogies to state causes of action based on that conduct. Other courts have focused on the underlying statutory nature of the § 1983 action.

No uniform method of characterization has emerged, due in large part to the fact that state statutory schemes vary widely. Circuit courts attempting to characterize § 1983 actions arising in different states within a particular circuit have selected different limitation periods depending on each state's law. *Compare Major v. Arizona State Prison,* 642 F.2d 311 (9th Cir. 1981) *with Clark v. Musick,* 623 F.2d 89 (9th Cir. 1980) (*per curiam*). Adding to the confusion is the fact that, on occasion, circuit courts have reached inconsistent results as to the applicable statute of limitations to be applied to § 1983 actions arising in a single state. *E.g., Beard v. Robinson,* 563 F.2d 331, 336 (7th Cir. 1977), *cert. denied sub nom Mitchell v. Beard,* 438 U.S. 907 (1978); *Garmon v. Foust,* 668 F.2d 400, 403 (8th Cir.), *cert. denied,* — U.S. — (1982).

The Tenth Circuit has addressed the question only occasionally,[4] and has never analyzed the issue in depth in the context of the statutory scheme which exists in New

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[4]There are few decisions from the Tenth Circuit concerning this issue, and most of those involve § 1983 actions arising in states other than New Mexico. *E.g., Childers v. Independent School District No. 1 of Bryan County,* 676 F.2d 1338 (10th Cir. 1982) [Oklahoma]; *Brown v. Bigger,* 622 F.2d 1025 (10th Cir. 1980) *(per curiam)* [Kansas]; *Spiegel v. School District No. 1, Laramie County,* 600 F.2d 264 (10th Cir. 1979) [Wyoming]; *Brogan v. Wiggins School District,* 588 F.2d 409 (10th Cir. 1978) [Colorado]. See also *Shah v. Halliburton Co.,* 627 F.2d 1055 (10th Cir. 1980) [Oklahoma] and *Zuniga v. AMFAC Foods, Inc.,* 580 F.2d 380 (10th Cir. 1978) [Colorado] which discuss the statute of limitations to be applied in 42 U.S.C. § 1981 cases.

Mexico.[5] In the absence of clear guidelines or precedent, the United States District Court judges in the District of New Mexico have, in the past, rejected the two year statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat.Ann. §§ 41-4-1 *et seq.* (1978), and applied either the four year statute of limitations contained in § 37-1-4 or the three year statute of limitations contained in § 37-1-8 to § 1983 actions. *E.g., Gunther v. Miller,* 498 F.Supp. 882 (D.N.M. 1980); *Bustos v. County of Mora,* No. 81-969-M (D.N.M. Feb. 9, 1982); *Melendrez v. Moore,* No. 80-107-M (D.N.M. March 10, 1980).

This issue needs to be addressed and resolved. There are currently several cases pending before this Court in which the issue of the proper statute of limitations to be applied to § 1983 actions in federal district court in the District of New Mexico has been raised. A review of the approaches taken by the many federal courts which have confronted this question is therefore in order.

A § 1983 claim is, of course, one based on statute. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). Some states have statutes of limitations which apply specifically to actions "created by federal statute." Where such state statutes exist, federal courts, including the Tenth Circuit, have frequently adopted those statutes of limitations as appropriate for use in § 1983 actions. *E.g., Chambers v. Omaha Public School District,* 536 F.2d 222 (8th Cir. 1976).

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[5]The Tenth Circuit was asked to determine the applicable New Mexico statute of limitations for a § 1983 action brought to redress alleged sex discrimination in *Hansbury v. Regents of the University of California,* 596 F.2d 944 (1979). Without discussion, the Court approved the district court's application of the four year statute [now codified in N.M.Stat.Ann. § 37-1-4 (1978)].

In *Spiegel v. School District No. 1, Laramie County,* 600 F.2d 264 (10th Cir. 1979), the Tenth Circuit specifically approved the district court's application of a two year Wyoming statute of limitations for "actions upon a liability created by a federal statute" to a § 1983 action. 600 F.2d at 266.

Federal courts in states with such statutes simply apply to those state statutes of limitations to § 1983 actions once they have determined that the statute of limitations in question is not inconsistent with either the Constitution and laws of the United States or the policies underlying § 1983 actions.[6] Having once made that determination, these courts bypass any search for a "closely analogous" state cause of action and simply adopt the statute of limitations for "actions created by federal statute" in § 1983 actions. "Courts need not search for a state statute which would apply only in a remotely analogous

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[6]In *Robertson v. Wegmann,* 436 U.S. 584 (1978), the United States Supreme Court reiterated the principal policies embodied in 42 U.S.C. § 1983 as deterrence and compensation. In deciding whether a state statute of limitations is consistent with those policies, a court must decide whether the statute of limitations in question permits a plaintiff to "readily enforce [his] claims, thereby recovering compensation and fostering deterrence." *Board of Regents v. Tomanio,* 446 U.S. at 448.

What such a determination entails is ensuring that the state statute of limitations chosen is "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions." *Shouse v. Pierce County,* 559 F.2d 1142, 1146 (9th Cir. 1977). In a recent Tenth Circuit opinion, *Childers v. Independent School District No. 1 of Bryan County,* 676 F.2d 1338 (10th Cir. 1982), the Court held that a six month limitations period set out in Oklahoma's Political Subdivision Tort Claims Act could not be applied to claims brought under 42 U.S.C. § 1983 because it was "inconsistent with the broad remedial purposes of the federal civil rights acts." *Id.* at 1343.

manner if a state statute of limitations is found which clearly governs and is directly related to the federal civil rights claims." *Chambers,* 536 F.2d at 228.

Other courts approach the issue in a slightly different manner. These courts characterize § 1983 actions as "actions created by statute" and then borrow the state statute of limitations for actions founded upon a liability created by statute. The Ninth and Second Circuits have followed this approach.[7] *E.g., Clark v. Musick,* 623 F.2d 89 (9th Cir. 1980) (*per curiam*); *Shouse v. Pierce County,* 559 F.2d 1142 (9th Cir. 1977); *Donovan v. Reinbold,* 433 F.2d 738 (9th Cir. 1970); *Smith v. Cremins,* 308 F.2d 187 (9th Cir. 1962); *Meyer v. Frank,* 550 F.2d 726 (2d Cir.), *cert. denied,* 434 U.S. 830 (1977); *Romer v. Leary,* 425 F.2d 186 (2d Cir. 1970). The Ninth Circuit, in particular, has stressed the statutory origin of the § 1983 action and has classified it as a species separate and apart from the typical common law tort action available under state law.

> Section 1983 of the Civil Rights Act clearly creates rights and imposes obligations different from any which would exist at common law in the absence of a statute . . . . The elements of an action under Section 1983 are (1) the denial under color of state law (2) of a right secured by the Constitution and laws of the United States. Neither of these elements would be required to make out a cause of action in a common-law tort; both might be present without creating common-law tort liability.

Smith v. Cremins, 308 F.2d 187, 190 (9th Cir. 1962).

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[7]The Seventh Circuit also characterizes § 1983 actions as "actions created by statute." *E.g., Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977), *cert. denied sub nom Mitchell v. Beard,* 438 U.S. 907 (1978). Accordingly, in § 1983 actions arising in Illinois, the Seventh Circuit applies Illinois' five year statute of limitations governing "all civil actions not otherwise provided for," which statute, under Illinois law, applies to causes of action created by statute. *Id.* at 335-36.

The Ninth Circuit recently modified to some extent its approach to characterizing § 1983 actions as a result of a change in a state statutory provision. In *Kowsikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981), the Court was faced with an express determination by the Oregon Legislature that the two year statute of limitations contained in the Oregon Tort Claims Act was the appropriate statute of limitations to apply to § 1983 actions. As noted, prior to *Kowsikowski* the Ninth Circuit had consistently characterized § 1983 claims as actions created by statute, and "whenever possible, [borrowed] the statute of limitations for actions founded on a liability created by statute." *Major v. Arizona State Prison*, 642 F.2d 311, 312 (9th Cir. 1981). In fact, in a previous § 1983 action arising in Oregon, *Clark v. Musick*, 623 F.2d 89, 91-92 (9th Cir. 1980) (*per curiam*), the Ninth Circuit had concluded that given a choice between the statute of limitations applicable to causes of action created by statute and the statute of limitations applicable to common law tort actions, the limitations period for statutory causes of action applied to § 1983 actions.

However, the issue was resubmitted to the Ninth Circuit in *Kowsikowski* after the Oregon Legislature expressly amended the Oregon Tort Claims Act. That amendment made the Tort Claims Act specifically applicable to violations of 42 U.S.C. § 1983.[8]

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[8]In 1977, the Oregon Legislature amended the last sentence of Or. Rev. Stat. § 30.265(1) to provide:

> Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employes and agents acting within the scope of their employment or duties, whether arising out of a governmental

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Because the issue had been explicitly decided by the Oregon Legislature, the Ninth Circuit no longer found it necessary—or appropriate—to resort to its former practice of characterizing the § 1983 action for the purpose of determining an appropriate state statute of limitations.

> Such characterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal [civil rights] law. . . .

Kowsikowski, 659 F.2d at 107. However, the Ninth Circuit expressly declined to abandon the practice of characterizing federal civil rights actions in the absence of express legislative determinations such as that contained in the Oregon Tort Claims Act.[9]

The two year statute of limitatons contained in the New Mexico Tort Claims Act (NMTCA) is one of the statutes of limitations available to this Court in the case at bar. Unlike the Oregon Legislature, the New Mexico Legislature has given no express legislative directive con-

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(Continued from previous page)

> or proprietary function. *As used in ORS 30.260 to 30.300, 'tort' includes any violation of 42 U.S.C. section 1983.* (emphasis added).

Those 1977 amendments made the Or. Rev. Stat. § 30.275(3) two-year statute of limitations in the Oregon Tort Claims Act applicable to § 1983 actions. *Kowsikowski*, 659 F.2d at 107.

[9]On rehearing, the Ninth Circuit declined to abandon its former characterization of 42 U.S.C. § 1981 actions in the absence of any express statement by the Oregon Legislature of the kind made regarding § 1983 actions. Absent such clear legislative direction, the Court chose to follow its own precedents "until contrary legislative signals appear." *Kowsikowski*, 659 F.2d at 108 *(on rehearing) (en banc)*.

cerning the state statute of limitations to be applied in § 1983 actions. Indeed, the language of the NMTCA indicates that tort actions are actions separate and apart from actions for the redress of federal constitutional rights such as are available under 42 U.S.C. § 1983.

Section 41-4-4(B) of the NMTCA provides that a governmental entity or employee while acting within the scope of his or her duty be defended against a claim for any tort *or* any violation of property rights *or* any rights, privileges or immunities secured by the Constitution of the United States. N.M.Stat.Ann. § 41-4-4(B) (Cum.Supp.1981) (emphasis added). Similarly, N.M.Stat.Ann. § 41-4-12 (1978) waives immunity for actions against law enforcement officers acting within the scope of their duties for "[certain specified torts], violation of property rights *or* deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States . . ." (emphasis added).

The language in the NMTCA's statute of limitations provision is equally unambiguous. It provides that:

> Actions against a governmental entity or a public employee for *torts* shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death . . . .

N.M.Stat.Ann. § 41-4-15(A) (1978) (emphasis added).

Thus, the plain language of the NMTCA indicates that the Legislature did not intend the term "tort" to include actions arising under § 1983. In construing New Mexico statutes, this Court must do so with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature. N.M.Stat.Ann. § 12-2-2 (1978). No intent

to include § 1983 actions within the meaning of the term "tort" in the NMTCA can be fairly read into the NMTCA as it now stands.

The remaining question, then, is whether the NMTCA provides the most closely analogous state cause of action to one brought under 42 U.S.C. § 1983. The method of characterizing the federal action thus becomes crucial. The United States District Courts for the District of New Mexico have, on several occasions, followed the reasoning of the Ninth Circuit and held that § 1983 actions are *sui generis*, and are not analogous to a cause of action under a state tort claims act. *Gunther v. Miller*, 498 F.Supp. 882 (D.N.M. 1980); *Walker v. Hall*, No. 81-376-M (D.N.M. June 14, 1982); *Johnnie K. v. County of Curry*, No. 81-914-M (D.N.M. April 15, 1982); *Bustos v. County of Mora*, No. 81-969-M (D.N.M. Feb. 9, 1982). *See, Monroe v. Pape*, 365 U.S. 167, 194 (1961) (Harlan, J. concurring), *overruled on other grounds, Monnell v. Department of Social Services*, 436 U.S. 658 (1978).

In *Gunther*, this Court adopted the reasoning in *Donovan v. Reinbold*, wherein the Ninth Circuit found the "assumed analogy" between the federal right created by the Civil Rights Act and any state-created remedies and immunities to be "ephemeral." *Donovan*, 433 F.2d 738 (9th Cir. 1970). The Court in *Donovan* viewed the California Tort Claims Act as the

> legislative response to [a California Supreme Court decision] abrogating common law governmental immunity from tort liability. [The] Act abolished all court declared and common law based forms of tort liability of public entities in the state with some exceptions, and substituted therefor a statutory system

> of liabilities and immunities, together with a procedural scheme to enforce the system.

Id. at 741. The Ninth Circuit went on to say that Congress had never shown its intention to defer to the states' remedies or procedures for vindication of § 1983 rights.

> [Congress] has never indicated an intent to engraft onto the federal right state concepts of sovereign immunity or of state susceptability to suit, which are the concepts which are the roots of the California Tort Claims Act. Indeed, the history of § 1983, summarized in Monroe v. Pape, [365 U.S. 167 (1961)], vividly demonstrates that state concepts of sovereign immunity were alien to the purposes to be served by the Civil Rights Act.

Id. at 742. See also *Gunther v. Miller*, 498 F.Supp. at 884.

Defendants in the case at bar ask this Court to reconsider its holding in *Gunther v. Miller*. They argue that, unlike the California Tort Claims Act, the NMTCA embraces both common law torts and federally protected constitutional rights without either singling out the federal rights for harsher treatment than the state-protected rights or intertwining the limitations period with state tort claims procedures.

These factors may indeed distinguish the NMTCA from the California Tort Claims Act scrutinized in *Donovan*. However, those differences don't undermine the basic premise taken by the Ninth Circuit in *Donovan* and by courts in this and other districts that § 1983 actions are "a bird of a different species, apart and unique from a state statutory cause of action brought under [a state tort claims act.]" *Walker v. Hall*, No. 81-376-M, slip op. at 3 (D.N.M. June 14, 1982). Absent an express legislative determination which would preclude the necessity of characterizing the § 1983 action for purposes of choosing an appropriate state statute of limitations, the reasoning adopted from *Donovan* still appears to be persuasive.

Defendants, however, urge this Court to adopt an approach to characterization of § 1983 actions based on the underlying conduct alleged in the § 1983 action. Courts using such an approach to characterization classify that underlying conduct according to the most closely related cause of action available under state law. The state statute of limitations applicable to that analogous state cause of action is then applied to the § 1983 action. The Third Circuit has consistently followed this approach and, until recently, the Eighth Circuit also occasionally characterized § 1983 actions in this manner. *E.g., Ammlung v. City of Chester*, 494 F.2d 811 (3d Cir. 1974); *Savage v. United States*, 450 F.2d 449 (8th Cir. 1971), *overruled by Garmon v. Foust*, 668 F.2d 400 (8th Cir.), *cert. denied*, — U.S. — (1982).

The New Mexico courts recently adopted a similar analysis in *DeVargas v. State of New Mexico*. In *DeVargas*, plaintiff sought damages in state court under 42 U.S.C. § 1983 for the alleged deprivation of his constitutional rights. Plaintiff alleged that he had been beaten by employees of the New Mexico Department of Corrections while incarcerated at the New Mexico Penitentiary.

The New Mexico Court of Appeals held that the controlling limitations period for § 1983 actions brought in state court in New Mexico is the two year period set out in the NMTCA at N.M.Stat.Ann. § 41-4-15(A)(1978). *DeVargas v. State of New Mexico*, 21 N.M. St. Bar Bull. 302 (March 18, 1982), Ct. App. No. 5062 (filed October 1, 1981). Petition for writ of certiorari to the New Mexico Supreme Court was first granted, then quashed as im-

providently issued. The Supreme Court held that the most closely analogous state cause of action to a 42 U.S.C. § 1983 cause of action is "provided by the New Mexico Tort Claims Act under Section 41-4-12 N.M.S.A. 1978." *DeVargas v. State of New Mexico*, 21 N.M. St. Bar Bull. 549, 550 (May 6, 1982). Thus, the Supreme Court concluded that the applicable statute of limitations for § 1983 actions would be the two year limitations period set out in § 41-4-15 of the NMTCA.

It certainly is desirable to designate one uniform statute of limitations to be applied to all § 1983 actions arising in New Mexico. However, while this Court has great respect for the courts of the State of New Mexico, it must nevertheless respectfully dissent from the choice made by the New Mexico Supreme Court. The New Mexico Supreme Court's holding on this issue is not binding here. As noted earlier, the characterization of the nature of the right being vindicated under § 1983 is a matter of federal, rather than state, law. *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Johnnie K. v. County of Curry*, No. 81-914-M (D.N.M. April 15, 1982). See also *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 706 (1966).

That is not to say that the method of characterization adopted in *DeVargas* is not without appeal. Classifying § 1983 actions according to the underlying conduct of the defendant appears to be an attractive solution to the difficult problem of characterization. Courts are frequently faced with cases involving fact patterns similar to that before the New Mexico courts in *DeVargas*: alleged deprivation of constitutional rights committed by law enforcement or corrections officers under color of state law. In such cases, cogent arguments can be made that NMTCA

claims are most closely analogous to those types of § 1983 claims.

Difficulties arise, however, when § 1983 actions occur in a context removed from law enforcement settings. Where the court is faced with a § 1983 action in which, for instance, a discharged teacher bases his or her § 1983 claim for wrongful discharge against a school board on the alleged exercise of free speech as protected by the First and Fourteenth Amendments, as in *e.g., Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977), the analogy adopted by the New Mexico Supreme Court is much more difficult to sustain. See also *Hansbury v. Regents of University of California*, 596 F.2d 944 (10th Cir. 1979), where the plaintiff claimed that defendant discriminatorily denied her recall rights and refused to rehire or hire her following a layoff.

Attempting to characterize § 1983 actions according to the underlying conduct of the defendant might well result in several different statutes of limitations being applied to § 1983 actions in federal district court in New Mexico. Differing analogies would be drawn between § 1983 actions and various state remedies, depending on the nature of the facts comprising the § 1983 claim. Such a result would be highly unsatisfactory. As stated by the Ninth Circuit in *Smith v. Cremins*, 308 F.2d at 190:

> Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action.

In summary, after considering all the options and approaches available, it appears that §1983 actions are best

characterized as actions based on statute. Because there is no specific New Mexico statute of limitations governing § 1983 actions or actions based on statute, it is the Court's conclusion that the best approach is to borrow the four year statute of limitations period contained in N.M. Stat. Ann. § 37-1-4 (1978) which governs "all other actions not . . . otherwise provided for."[10] Plaintiff's action in the case at bar is therefore found to be timely filed. An Order will be entered in accordance herewith, which will certify the statute of limitations issue in this case pursuant to 28 U.S.C. § 1292(b).

/s/ Howard C. Bratton
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV NO. 82-092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants.

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[10]A similar approach was taken by the Eighth Circuit Court of Appeals in *Garmon v. Foust*, 668 F.2d 400 (8th Cir.), cert. denied, — U.S. — (1982), where the Court was faced with reconciling inconsistent holdings in that Circuit as to the applicable statute of limitations for civil rights actions arising in Iowa. The Court rejected the tort analogy "because it unduly cramps the significance of § 1983 as a broad, statutory remedy." *Id.* The Court applied the general statute of limitations applicable to causes of action not specifically governed by other statutes of limitations rather than the two year statute for actions "founded on injury to person or reputation." *Id.* at 405-06.

O R D E R

Filed July 21, 1982

This matter having come before the Court on defendants' motion to dismiss plaintiff's action under 42 U.S.C. § 1983 on the grounds that plaintiff's action is barred as untimely filed by the statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat.Ann. § 41-4-15(A), and the Court having entered a Memorandum Opinion herein; NOW, THEREFORE,

IT IS ORDERED that defendants' notice to dismiss be, and hereby is, denied.

The Court is further of the opinion that this matter involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the Order entered herein may materially advance the ultimate termination of the litigation.

/s/ Howard C. Bratton
Chief Judge

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constiution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

N.M. Stat. Ann. § 41-4-12 (1978)

41-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.
N.M. Stat. Ann. § 41-4-15 (1978)

41-4-15. Statute of limitations.

A. Actions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occur-

rence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability.

B. The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976.

N.M. Stat. Ann. § 37-1-4 (1978)

37-1-4. [Accounts and unwritten contracts; injuries to property; conversion; fraud; unspecified actions.]

Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four years.

N.M .Stat. Ann. § 37-1-8 (1978)

37-1-8. Actions against sureties on fiduciary bonds; injuries to persons or reputation.

Actions must be brought against sureties on official bonds and on bonds of guardians, conservators, personal representatives and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person from whom they are sureties is finally established or determined by a judgment or decree of the court, and for an injury to the person or reputation of any person, within three years.

Office - Supreme Court, U.S.
FILED
AUG 1 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-2146

In The

Supreme Court of the United States

October Term, 1983

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RICHARD WILSON and MARTIN VIGIL,

Petitioners,

vs.

GARY GARCIA,

Respondent,

----------o----------

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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COUNSEL FOR RESPONDENT

July 30, 1984

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. When a State's highest court determines a state limitations period for actions brought under 42 U.S.C. §1983 that discriminates against federal claims, such that federal claims will be barred, but equivalent state claims will not, or where the state limitations period is so short as to be unreasonable for bringing certain §1983 actions, is it improper for a federal Court to independently determine the appropriate state statute of limitations to be applied to an action brought in Federal Court under 42 U.S.C. §1983?

2. What are the criteria that the Federal Court should follow in determining the appropriate state statute of limitations

for an action brought in Federal Court under 42 U.S.C. §1983 where the state limitations period, as determined by the State Courts, discriminates against federal claims, or is unreasonably short?

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No. 83-2146

In The

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October Term, 1983

RICHARD WILSON and MARTIN VIGIL,

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vs.

GARY GARCIA,

Respondent,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Respondent Gary Garcia respectfully requests The United States Supreme Court to deny the Petition for Writ of Certiorari to review the judgment and opinion of the United

States Court of Appeals for the Tenth Circuit entered in this case on March 30, 1984.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit (en banc) is reported at 731 F.2d 640 (10th Cir. 1984). The opinion of the Federal District Court of New Mexico is not reported. Both opinions are found in the Appendix to the Petition for Writ of Certiorari at pages App. 1 and App. 28, respectively.

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JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on March 30, 1984. The Petitioners have invoked the

jurisdiction of this Court under 28 U.S.C. §1254(1).

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CONSTITUTIONAL PROVISIONS AND STATUTES

The Petition involves consideration of the following statutory provisions: 42 U.S.C. §1983, 42 U.S.C. §1988, N.M. Stat. Ann. §37-1-4 (1978), N.M. Stat. Ann. §37-1-8 (1978), N.M. Stat. Ann. §41-4-12 (1978), N.M. Stat. Ann. §41-4-15 (1978), N.M. Stat. Ann. §41-4-16 (1978), and N.M. Stat. Ann. §41-4-19 (1978). The full text of each of these statutes, with the exception of N.M. Stat. Ann. §§41-4-16 and 41-4-19 (1978), is set forth in the Appendix of the Petition for Writ of Certiorari. The full text of N.M. Stat. Ann. §§41-4-16 and 41-4-19 (1978) is set forth in the Appendix to this Brief.

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STATEMENT OF THE CASE

The Respondent, Gary Garcia, filed a lawsuit, in the United States District Court for the District of New Mexico, under 42 U.S.C. §1983 against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, the then Chief of the New Mexico State Police, in their individual capacities. He seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and for the severe personal injuries he suffered as a result of the acts and omissions of the Petitioners acting under color of law. The Complaint specifically alleges that Petitioner Wilson unlawfully and "brutally and viciously" beat Respondent with a "slapper," and thereafter sprayed tear gas in

the face of Respondent. The Complaint also alleges that Petitioner Vigil improperly allowed Petitioner Wilson to be hired as a New Mexico State Police Officer because, prior to his employment with the New Mexico State Police, Petitioner Wilson had been convicted of a variety of serious criminal offenses in several states, and there were arrest warrants outstanding against Petitioner Wilson in the states of Minnesota and North Dakota and that these facts were known by, or should have been known by, Petitioner Vigil. The Complaint further alleges that, prior to Petitioner Wilson's employment with the New Mexico State Police, Petitioner Vigil had received information that Petitioner Wilson had been fired for stealing from a former employer, and that Petitioner Vigil had been advised by two high-ranking New Mexico State Police

Officers, who had investigated Petitioner Wilson's employment application with the New Mexico State Police, that Petitioner Vigil should not hire Petitioner Wilson as a New Mexico State Police Officer. The Complaint alleges that the conduct of Petitioner Vigil, in allowing Petitioner Wilson to be hired as a New Mexico State Police Officer, directly caused the injuries and violations of the civil rights suffered by the Respondent.

The Complaint also alleges that Petitioner Vigil failed to properly and adequately discipline, train and control Petitioner Wilson, thereby directly causing the injuries and violations of civil rights suffered by the Respondent.

The incident in question in this case took place on April 27, 1979. In the Complaint it is alleged that the incident of April 27, 1979, involving Respondent and

Petitioner Wilson, occurred just four days after Petitioner Wilson viciously assaulted two women, and several months after Petitioner Wilson had physically abused another citizen, and that Petitioner Vigil was placed on notice of the violent propensities of Petitioner Wilson. The Complaint further alleges that Petitioner Vigil did not suspend, or take disciplinary, or any other action, against Petitioner Wilson.

This lawsuit was timely filed on January 28, 1982, pursuant to Gunther v. Miller, 498 F.Supp. 882 (D.N.M. 1980) and Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979). The Petitioners filed a Motion to Dismiss claiming that the two-year statute of limitations contained in the New Mexico Tort Claims Act, N.M. Stat. Ann., §41-4-15(A), 1978 (hereainafter

"NMTCA") barred the filing of Respondent's Complaint.

Approximately one month after the filing of the Complaint, the New Mexico Supreme Court entered its decision quashing certiorari in DeVargas v. State of New Mexico, 97 N.M. 563, 642 P.2d 166 (1982) and without analysis or characterization of the claim, erroneously stated that the NMTCA two-year statute of limitations should apply to §1983 actions. On July 21, 1982, the Honorable Howard Bratton, Chief Judge, filed his Opinion and Order denying the Motions to Dismiss and holding that the appropriate New Mexico statute of limitations for §1983 actions was the four-year general statute of limitations contained in §37-1-4, NMSA 1978. Gunther v. Miller, 498 F.Supp. 882 (D.N.M. 1980). Chief Judge Bratton then entered his Order certifying an immediate interlocutory

appeal on the statute of limitations issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. §1292(b). On January 6, 1983, the Tenth Circuit granted Petitioners permission to appeal from Chief Judge Bratton's Order on the statute of limitations issue.

The cause was argued and submitted to a three-judge panel on March 7, 1983. The submission Order was vacated on May 23, 1983, and on the Court's own motion, the appeal was submitted to the full Court for an en banc determination. Thereafter, the Tenth Circuit posed a series of questions to counsel in a number of pending cases from the several states within the Circuit seeking supplemental briefs regarding the criteria for selection of the appropriate state statute of limitations to be applied to cases brought under 42 U.S.C. §1983. Oral argument

was held before the Court en banc on October 11, 1983.

On March 30, 1984, the Tenth Circuit, sitting en banc, issued its Opinion and Order of Judgment. Garcia v. Wilson, 731 F.2d 640 (10th Cir. 1984). In its Opinion, the Court determined that the Complaint in this case was timely filed. The Court further determined that, in the Tenth Circuit, henceforth, all §1983 claims will be uniformly characterized for statute of limitations purposes as "an action for injury to personal rights" rather than in terms of the specific facts generating a particular suit.

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ARGUMENT

1. SUMMARY OF THE ARGUMENT

The Tenth Circuit Court of Appeals (en banc), after giving full consideration of the issues and undertaking an exhaustive analysis of the applicable law, unanimously ruled that §1983 actions are best characterized as actions for injuries to personal rights. Garcia v. Wilson, 731 F.2d 640, 651 (10th Cir. 1984) (en banc). The Tenth Circuit correctly decided that this §1983 action was timely filed and that the appropriate limitations period is that found in N.M. Stat. Ann. §37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years."

The NMTCA statute of limitations, urged by the Petitioners, does not provide the most closely analogous New Mexico State cause of

action to one brought under 42 U.S.C. §1983. Moreover, the NMTCA limitations period is inconsistent with federal law. The two-year limitations period of the NMTCA, N.M. Stat. Ann. §44-4-15(A) (1978) discriminates against federal claims, such that a federal claim would be time barred, while an equivalent state claim would not. The NMTCA also contains a 90-day notice provision which operates as a statute of limitations. This 90-day notice provision is so short as to be unreasonable and inconsistent with federal law. Therefore, the NMTCA limitations period was properly disregarded by both the Tenth Circuit (en banc) and the Federal District Court. Burnett v. Grattan, ___ U.S. ___, 52 L.W. 4916, 4919 (1984). The decision of the Tenth Circuit was correct and represents the fairest and simplest approach to characterizing federal civil rights actions.

2. REASONS FOR DENYING THE WRIT

A. The decision of the Tenth Circuit was correct and represents the fairest and most proper approach to characterizing federal civil rights actions.

The approach adopted by the Tenth Circuit (en banc) below is the most direct and proper method for determining the appropriate state statute of limitations to be applied in §1983 litigation. The characterization of §1983 claims as "actions to recover for injury to pesonal rights," 731 F.2d at 651, is supported by federal law. This manner of characterization allows for uniformity within the particular states in the Circuit, but does not create the nationwide uniformity rejected in Board of Regents v. Tomanio, 446 U.S. 478, 489 (1980). Any result, other than the one reached below, will continue to lead to confusion or chaos

in the Tenth Circuit. The Court would have to continue to confront a myriad of §1983 statute of limitations problems from each of the several states within the Circuit. Needless to say, this litigation on collateral issues wastes judicial resources.

The desirability of uniformity within the Tenth Circuit is self-evident. Litigants will now have settled expectations regarding the statute of limitations that will be applied to federal civil rights actions. Reference will be made to state law to determine the statute of limitations which applies to injuries to personal rights. There will no longer be the inevitable battles between litigants over the characterization of the action based upon the underlying conduct of the defendant. As aptly noted by Chief Judge Bratton of the New Mexico Federal District Court:

> Attempting to characterize §1983 actions according to the underlying conduct of the defendant might well result in several different statutes of limitations being applied to §1983 actions in federal district court in New Mexico. Differing analogies would be drawn between §1983 actions and various state remedies, depending on the nature of the facts comprising the §1983 claim. Such a result would be highly unsatisfactory. As stated by the Ninth Circuit in Smith v. Cremins, 308 F.2d at 190:
>
> > Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitation applicable to each state-created right were applied to the single federal cause of action. (Petitioner's Appendix, p. 43)

The concerns of the Federal District Judges, who must regularly decide the

assorted federal civil rights statute of limitations questions, have been addressed by the Tenth Circuit (en banc). 731 F.2d at 649-650. Because of the reasonableness and fairness of the uniform characterization method adopted by the unanimous Tenth Circuit, it is highly likely that other Circuit Courts will utilize this approach. This Court should not grant the Petition for Writ of Certiorari at this time. Rather, the other Circuit Courts should be allowed the opportunity to consider the wisdom of the en banc decision below. As the law in this area develops, this Court will be in a better position to determine whether to exercise its certiorari jurisdiction.

B. The New Mexico Tort Claims Act is inconsistent with federal law and it is not the most analogous state cause of action.

The Civil Rights Act of 1871, codified in 42 U.S.C. §1983, does not contain a statute of limitations, but in 42 U.S.C. §1988, Congress instructs the Federal Courts to refer to state statutes when federal law provides no rule of decision. In Garcia v. Wilson, supra, the Tenth Circuit set forth the proper test in determining the most appropriate statute of limitations for §1983 actions:

> The first step in selecting the applicable state statute of limitations is to characterize the essential nature of the federal action. [Citations omitted.] Characterization of such a federal claim is a matter of federal law. [Citations omitted.] The court must then determine which state limitations period is applicable to this characterization. [Citations omitted.] Although the federal courts are bound by the state's

> construction of its own statutes of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a federal claim. [Citations omitted.]
> 731 F.2d at 642-643.

The Tenth Circuit correctly ruled that the two-year limitations period contained in N.M. Stat. Ann. §41-4-15(A) of the NMTCA is not the controlling limitations period for §1983 actions. 731 F.2d at 651, n. 5. The NMTCA does not provide an analogous cause of action because the express language of the NMTCA indicates that tort actions are separate and apart from actions for the redress of federal constitutional rights such as are available under §1983.

The New Mexico Supreme Court, in an opinion which examined the difference between a cause of action under the NMTCA and a §1983 action, stated that "the New Mexico Legislature recognizes that a tort is

separate and distinct from a constitutional deprivation." Wells v. Valencia County, 98 N.M. 3, 6, 644 P.2d 517, 520 (1982). The opinion in Wells is totally inconsistent with the prior statements of the New Mexico courts in DeVargas v. State of New Mexico, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), cert. quashed as improvidently issued, 97 N.M. 563, 642 P.2d 166 (1982), and the position asserted by the Petitioners regarding the applicable statute of limitations for §1983 actions. Possibly, the confusion of the New Mexico Supreme Court, in analyzing the nature of a §1983 action, stems from the almost total lack of experience that Court has had with §1983 actions. A review of the New Mexico Reports reveals that, during the thirty years prior to the DeVargas decision, the New Mexico Supreme Court decided a total of two §1983 cases--Gomez v. Bd. of Education

of Dulce, 85 N.M. 708, 516 P.2d 679 (1973), and Jacobs v. Stratton, 94 N.M. 665, 615 P.2d 982 (1980).

In reaching the conclusion that §1983 actions and Tort Claims Act actions are separate and distinct concepts, the New Mexico Supreme Court, in Wells, and Chief Judge Bratton in the Federal District Court below, in Garcia v. Wilson, supra (Petitioner's Appendix, p. 28), analyzed basically the same provisions of the NMTCA. Chief Judge Bratton observed that:

> "[n]o intent to include §1983 actions within the meaning of the term 'tort' in the NMTCA can be fairly read into the NMTCA as it now stands."
> Garcia v. Wilson (Petitioner's Appendix at 39)

See Wells v. Valencia County, 98 N.M. at 6, 644 P.2d at 520.

Section 41-4-12 of the NMTCA does not create the same cause of action as §1983.

Although §41-4-12 purports to waive immunity for law enforcement officers, that section of the NMTCA does not have the same breadth and scope as a §1983 action. The essential elements of a §1983 action are (1) the denial under color of law (2) of a right secured by the Constitution and laws of the United States. Garcia v. Wilson, supra. See also Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977), cert. denied sub nom., Mitchell v. Beard, 438 U.S. 907 (1978). Section 41-4-12 of the NMTCA does not provide a cause of action against a law enforcement officer who acts under color of law but outside the scope of the officer's employment. In fact, the NMTCA bars such an action by requiring the officers to act within the scope of employment as an element that must be proven under §41-4-12. Section 1983 provides a cause of action under these same

circumstances. See Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1976), cert. granted, 424 U.S. 910, cert. dismissed, 429 U.S. 118. The fact that an officer was acting outside the course and scope of his employment will be a defense to a Tort Claims Action, but it will not defeat a §1983 claim where the officer was acting under "color of law." This is so because "color of law" is a broader concept than "acting within the course and scope of employment." See Cameron v. City of Milwaukee, 307 N.W.2d 164 (Wisc.Sup.Ct. 1981) and Davis v. Murphey, 559 F.2d 1098 (7th Cir. 1977).

The action allowed by §41-4-12 of the NMTCA for Constitutional deprivations is very different from, and much more limited than, a §1983 action. The NMTCA has statutory limitations on damages and does not allow the

recovery of punitive damages.[1] However, Section 1983 serves basically two functions: (1) the prevention of the abuse of state power, and (2) the compensation of persons whose civil rights have been violated. Burnett v. Grattan, ___ U.S. ___, 52 L.W. 4916 (1984); Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981). There is no statutory limitation on the amount of damages an injured party can be awarded in a §1983 action. In addition, punitive damages are allowed to be awarded in §1983 actions under proper circumstances. See Smith v. Wade, ___ U.S. ___, 103 S.Ct. 1625 (1983). It is, therefore, obvious that §41-4-12 of the NMTCA is not the most analogous state cause of

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[1] §41-4-19(A) of the NMTCA provides a limitation on damages, and only covers a public employee who has acted within the scope of his duties. Section 41-4-19(B) precludes any award of punitive damages under the NMTCA.

action to a §1983 claim. Since that Section is not the most analogous state cause of action to a §1983 claim, §41-4-15(A) of the NMTCA, the two-year statute of limitations provision of the NMTCA, does not apply to §1983 actions.

Because of the correctness of the Tenth Circuit's decision to not apply the NMTCA limitation period, certiorari should be denied. The Tenth Circuit's approach to characterization will avoid the need to describe the federal cause of action in terms of state law as was done above. No longer will there be voluminous litigation that is collateral to the merits and that consumes scarce judicial resources. "All of the federal values at issue in selecting a limitations period for §1983 claims are best served by articulating one uniform characterization describing the essential

nature underyling all such claims." 731 F.2d at 650.

C. The New Mexico Tort Claims Act limitations period is inconsistent with federal law since it discriminates against federal claims.

The interpretation by the New Mexico Supreme Court, in DeVargas v. State of New Mexico, 97 N.M. 563, 642 P.2d 166 (1982), of the applicable New Mexico limitations period to be applied to a §1983 action, discriminates against federal claims, like the one at bar, such that federal claims will be time barred while equivalent state claims will not. In New Mexico, a litigant in an assault and battery case has three years to bring suit under N.M. Stat. Ann. §37-1-8 (1978). Yet, under the DeVargas decision, a civil rights claim alleging an atrocious and outrageous police beating must be brought within two years pursuant to N.M. Stat. Ann.

§41-4-15(A) (1978). This has the improper discriminatory effect of making the statute of limitations for a §1983 action shorter than the statute of limitations for personal injury. Burnett v. Grattan, ___ U.S. at ___, n. 15, 52 L.W. at 4919, n. 15 (1984); Johnson v. Davis, 582 F.2d 1316 (4th Cir. 1978) (rejecting Virginia's express one-year statute of limitations for §1983 actions as discriminatory against federal cause of action).

The Petitioners urge this Court to grant certiorari to adopt the discriminatory §1983 statute of limitations position of the New Mexico Courts. The opinion of the New Mexico Court of Appeals in DeVargas demonstrates a lack of understanding of the significant differences between a tort claims action and a §1983 action. In addition, the New Mexico Court of Appeals, in DeVargas, never held

that the controlling limitations period for §1983 actions brought in State Court in New Mexico is the two-year period set out in the NMTCA at §41-4-15(A). The New Mexico Court of Appeals made no choice, in DeVargas, regarding the appropriate statute of limitations to be applied to §1983 actions. 97 N.M. at 451, 640 P.2d at 1331.

The language regarding the two-year §1983 limitations period comes from the New Mexico Supreme Court decision quashing certiorari in DeVargas and is dicta. 97 N.M. at 564, 642 P.2d at 167. A decision quashing certiorari is of no precedential value and indicates nothing more than the reviewing Court's conclusion that the case "is not appropriate for adjudication." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (on rehearing); see also Gonzales v. Stanke-Brown Assoc., Inc., 98 N.M. 379, 648

P.2d 1192 (Ct.App. 1982) (Sutin, J., specially concurring). The New Mexico Supreme Court, in DeVargas, did not characterize §1983 actions. Rather, the Court, without any reasoned analysis or discussion, simply adopted the two-year limitation period in the NMTCA for §1983 actions. 97 N.M. at 564, 642 P.2d at 167. The New Mexico Supreme Court gave no consideration, whatsoever, to whether certain conduct, actionable under §1983, is even covered by the NMTCA. See, e.g., Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) (substantive due process claim against school teacher); Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) (First Amendment); Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979) (employment discrimination).

The decision of the New Mexico Courts in DeVargas, and urged by the Petitioners, has the effect of discriminating against a whole range of federal civil rights claims. For example, under DeVargas, a child brutally beaten by a school official, and therefore having a substantive due process claim against that official, see Hall v. Tawney, supra, must bring a §1983 action within two years, whereas a simple assault claimant has three years to bring suit under N.M. Stat. Ann. §37-1-8 (1978). A police officer who is the victim of wrongful termination due to protected First Amendment activity must bring his §1983 suit within two years while other victims of wrongful termination of employment have four years to bring suit under N.M. Stat. Ann. §37-1-4 (1978). See Hansbury v. Regents of the University of California, 596 F.2d 944 (10th Cir. 1979).

This Court has been steadfast in its opinion that a state limitations scheme must not discriminate against federal claims. For, as Justice Rehnquist noted:

> Plainly, if the state statute of limitations discriminates against federal claims, such that a federal claim would be time barred, while an equivalent state claim would not, then state law is inconsistent with federal law.
> Burnett v. Grattan, ___ U.S. ___ (1984) (Rehnquist, J., concurring opinion).

The decision by the Tenth Circuit (en banc) to disregard the DeVargas decision does not implicate any fundamental principles of federalism. A state statute of limitations should not be selected when it is inconsistent with federal law. The discriminatory impact of the NMTCA limitations period is inconsistent with federal law. This Court's decision in Burnett v. Grattan, supra, is controlling.

This case, therefore, is not an appropriate one for this Court to exercise its certiorari jurisdiction.

D. The New Mexico Tort Claims Act 90-day notice provision which operates as a statute of limitations is inconsistent with federal law since it is unreasonably short.

Another example of the derogation of rights a civil rights litigant has under the NMTCA is the requirement of notice provision contained within §41-4-16 of the NMTCA. This notice provision applies to the entire New Mexico Tort Claims Act, including §41-4-12, the law enforcement officers section, and §41-4-15(A), the two-year limitation period of the NMTCA. Section 41-4-16A requires a person claiming damages against the State or a local public body to give written notice of the claim to a specified governmental official "within ninety (90) days after an

occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act." Section 41-4-16B provides an absolute defense to a claim for damages under the NMTCA unless the requisite written notice has been given as required by §41-4-16A, or unless the governmental entity had actual notice of the occurrence. Section 41-4-16C lengthens the notice period to six (6) months in a wrongful death situation.

The New Mexico Courts have interpreted this notice provision as being in the nature of a statute of limitations. See Ferguson v. New Mexico State Highway Commission, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982). Since the 90-day notice provision section applies to the entire NMTCA, the 90-day notice required by §41-4-16A is required even for constitutional deprivations. This Court has made it clear that the federal policy behind

the civil rights statutes must be considered when a choice is to be made among the various state limitation statutes.

> "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute."
> Occidental Life Insurance Co. v. EEOC, 432 U.S. 355, 367 (1977)

In Childers v. Independent School District No. 1 of Bryan County, 676 F.2d 1338, 1343 (10th Cir. 1982), the Tenth Circuit stated that "a plaintiff seeking in federal court to vindicate a federally created right cannot be made to jump through the procedural hoops for tort-type cases that may have commended themselves to the legislative assemblies of the several

states." Burnett v. Grattan, ___ U.S. ___, n. 9, 52 L.W. 4916, 4918, n. 9 (1984). The 90-day notice provision of the NMTCA, interpreted as a statute of limitations bar, is similar to the type of procedural hoop condemned in Childers. The 90-day notice provision is so short as to be inconsistent with federal law. See Burnett v. Grattan, supra. The 90-day notice provision of the NMTCA is another reason why the Tenth Circuit was correct in refusing to follow the DeVargas decision and apply the NMTCA limitations period scheme to §1983 actions.

----------o----------

CONCLUSION

The decision below is correct. The Petitioners have advanced no compelling or persuasive reason supporting the relief they

request. Certiorari, therefore, should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX A

N.M. Stat. Ann. Chapter 41 (1978)
Torts

§41-4-16. Notice of Claims

A. Every person who claims damages from the state or any local public body under the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall cause to be presented to the risk management division for claims against the state, the mayor of the municipality for claims against the municipality, the superintendent of the school district for claims against the school district, the county clerk of a county for claims against the county, or to the administrative head of any other local public body for claims against such local public body, within ninety days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act, a written notice

stating the time, place and circumstances of the loss or injury.

B. No suit or action for which immunity has been waived under the Tort Claims Act shall be maintained and no court shall have jurisdiction to consider any suit or action against the state or any local public body unlesss notice has been given as required by this section, or unless the governmental entity had actual notice of the occurrence. The time for giving notice does not include the time, not exceeding ninety days, during which the injured person is incapacitated from giving the notice by reason of injury.

C. When a claim for which immunity has been waived under the Tort Claims Act is one for wrongful death, the required notice may be presented by, or on behalf of, the personal representative of the deceased

person or any person claiming benefits of the proceeds of a wrongful death, action, or the consular officer of a foreign country of which the deceased was a citizen, within six months after the date of the occurrence of the injury which resulted in the death; but if the person for whose death the claim is made has presented a notice that would have been sufficient had he lived, an action for wrongful death may be brought without any additional notice.

§41-4-19. Maximum Liability

A. In any action for damages against a governmental entity or a public employee while acting within the scope of his duties as provided in the Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978], the liability shall not exceed:

(1) The sum of one hundred thousand dollars ($100,000) for damage to or destruction of property arising out of a single occurrence;

(2) the sum of three hundred thousand dollars ($300,000) to any person for any number of claims arising out of a single occurrence for all damages other than property damage as permitted under the Tort Claims Act; or

(3) the sum of five hundred thousand dollars ($500,000) for all claims arising out of a single occurrence.

B. No judgment against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act shall include an award for exemplary or punitive damages or for interest prior to judgment.

(3)

No. 83-2146

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD WILSON and MARTIN VIGIL,
Petitioners,

v.

GARY GARCIA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF OKLAHOMA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA, FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF REVERSAL

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MOTION OF OKLAHOMA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA, FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Oklahoma County, State of Oklahoma, pursuant to Rule 36 of the Rules of this Court, respectfully moves for leave to file the attached brief *amicus curiae* in this case. Oklahoma County is a political subdivision of the State of Oklahoma and its counsel of record herein is its authorized legal representative. Pursuant to Rule 36.4 of the Rules of this Court, consent to the filing of the attached brief *amicus curiae* is not necessary. Counsel of record for the Petitioners have, however, given their consent orally to the filing of the attached brief by Oklahoma County, a Political Subdivision of the State of Oklahoma.

The interest of Oklahoma County in this case arises by virtue of its location as one of six states within the

Tenth Circuit and by the fact that the rulings of that Circuit's Court of Appeals are controlling in federal civil rights suits brought in Oklahoma. Oklahoma County has numerous civil rights cases pending in its Federal District Court wherein the applicable state statute of limitations will be dispositive. Oklahoma is also one of six states within the Tenth Circuit wherein the rule announced in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984), as to the applicable state statute of limitations to be applied in cases brought under 42 U.S.C. §1983, has led to an irreconcilable conflict between state and federal law.

WHEREFORE, Oklahoma County, a Political Subdivision of the State of Oklahoma, herewith submits and, to the extent necessary, requests leave to file the attached brief *amicus curiae* on its merits.

Dated this 13th day of November, 1984.

Respectfully submitted,

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AMICUS CURIAE BRIEF OF OKLAHOMA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA

INTEREST OF AMICUS CURIAE

Oklahoma County, as a political subdivision of the State of Oklahoma, sits bound by the rulings of both the Oklahoma Supreme Court and of the Court of Appeals for the Tenth Circuit applying state procedural limitations periods to claims brought under 42 U.S.C. §1983. Oklahoma County has pending several federal civil rights suits wherein the applicable state statute of limitations will be dispositve.

As is true in New Mexico, Petitioners' home state, the Tenth Circuit has applied its holding in *Garcia* v. *Wilson*, 731 F.2d 640, at 651 (March 30, 1984), to Oklahoma, in *Abbitt* v. *Franklin*, 731 F.2d 661 (March 30, 1984). In so doing, the Tenth Circuit has disregarded the limitations

period held applicable by Oklahoma's highest state court to the same type of claim brought in state court. Thus has arisen an irreconcilable conflict in Oklahoma between federal and state courts upon a procedural matter not governed by federal law, and upon which both Congress and this Honorable Court have declared state law shall control. This clash between state and federal courts sitting in Oklahoma, upon matters in which the interpretations of the highest court of the state must control, can only be remedied by this Court's reversal of *Garcia* v. *Wilson*, supra, and a resulting return to the straightforward application of the rules and principles enunciated and protected by this Court since *Bauserman* v. *Blunt*, 147 U.S. 647, 13 S.Ct. 466, 37 L.Ed. 316 (1893), and culminating in *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

SUMMARY OF ARGUMENT

The decision and the rationale of *Garcia* v. *Wilson* is contrary to the Tenth Amendment and to the principles of federalism embodied therein. Further, federal courts are bound by the highest state court's construction of its own statute of limitations in Section 1983 actions. This is specifically mandated by Congress, in 42 U.S.C. §1988, and by this Court's rulings in the trilogy of *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 2d 295 (1975); *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978), and *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980). Section 1988, by its express terms, authorizes federal courts to disregard applicable state law *only* if the law is "inconsistent with the Constitution and laws of the United States".

Thus, a state's statute of limitations may not be rejected and displaced with some ad hoc federal rule in the name of uniformity and the advancement of goals of federalism.

Recognizing but not following these fundamental principles of law and federalism, the Tenth Circuit resolved to use the certification of a narrow question of conflict to impose a broad and sweeping rule upon its federal district courts and to:

> ". . . establish a uniform approach to govern resolution of this question in future cases."

Garcia v. *Wilson*, supra, at 642. In justification thereof, the Court of Appeals declared:

> "In the face of Congressional refusal to enact a uniform statute and the Supreme Court's failure to come to grips with the problem, it is imperative that we establish a consistent and uniform framework by which suitable statutes of limitations can be determined for all section 1983 claims in this circuit."

Id. at 643. Your *amicus curiae* submits that the conclusions and the ruling in *Garcia* v. *Wilson*, supra, are:

> ". . . at odds with the reasoning in our prior opinions in this field as well as at odds with federalism itself."

Board of Regents v. *Tomanio*, 446 U.S. 478, 489, 100 S.Ct. 1790, 1797.

ARGUMENT

I. THE TENTH CIRCUIT'S REPUDIATION OF CONTROLLING STATE LAW IS VIOLATIVE OF THE TENTH AMENDMENT AND OF LONGSTANDING PRINCIPLES OF FEDERALISM.

Under the guiding hand of this Court and the Constitution, hand in hand participation between federal and state governments and courts have met with a success that neither could have unilaterally.

> "These facts stand out as a result of this analysis of the Philadelphia Convention and the state ratifying conventions. Both the nationalists and the states' righters were in substantial agreement on the need for a supreme judicial arbiter in federal-state relations. By 1789 it was clearly understood that the Supreme Court of the United States was to fulfill that role. Naturally enough, the nationalists tended to emphasize the aspect of judicial arbitership concerned with the protection of national supremacy against state encroachments. However, both nationalists and states' righters explicitly recognized that the Supreme Court's role was that of an impartial arbiter. Thus, it was also anticipated that federal laws violative of state's rights were to be declared unconstitutional . . ." [1]

Thus, it is to this Court that the States look for relief in preserving and protecting the principles of federalism guaranteed in the Tenth Amendment. Indeed, the rule of law has been violated by both the holding and the rationale of *Garcia* v. *Wilson*. Use of the Court of Appeals' stratagem

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[1] SCHMIDHAUSER, *States' Rights and the Origin of the Supreme Court's Power in Federal-State Relations*, 4 Wayne Law Review 101, 104 (1958).

of uniform "characterization" does not eclipse the fact that the lower federal court has elevated its own desire for uniformity above the law of the Constitution, the law of Congress, and the law of this Supreme Court. It is not suggested that some uniformity upon the application of limitations periods in suits brought under Section 1983 is an evil goal. But we must remember that the very concept of federalism embraces diversity of laws. Until Congress acts under power of the Fourteenth Amendment to repeal or amend Section 1988, this Court must be vigilant in protecting the States from such unwarranted federal usurpation. As stated by Justice Harlan Fiske Stone, in dissent to the opinion of the Court in *United States* v. *Butler:*

> "The present stress of widely held and strongly expressed differences of opinion of the wisdom of the Agricultural Adjustment Act makes it important, in the interest of clear thinking and sound result, to emphasize at the outset certain propositions which should have controlling influence in determining the validity of the act. They are:
>
> 1. The power of courts to declare a statute unconstitutional is subject to *two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint. For removal of unwise laws from the statute books appeal lies, not to the Courts, but to the ballot and to the processes of democratic government . . .*"

297 U.S. 1, 78-79, 56 S.Ct. 312, 325, 80 L.Ed. 477 (1936) [Emphasis added]. And by Justice Felix Frankfurter, in dissent to the Court's opinion in *West Virginia Board of Education* v. *Barnette*:

> "... *It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench.* The only opinion of our own even looking in that direction is our opinion whether legislators could in reason have enacted such a law. . . . We have been told that generalities do not decide concrete cases. But the intensity with which a general principle is held may determine a particular issue, and whether we put things first may decide a specific controversy. . . . The Constitution does not give us greater veto power when dealing with one phase of 'liberty' than with another, . . . In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. *There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked . . .*"

319 U.S. 614, 647-648, 63 S.Ct. 1178, 1189-1190, 87 L.Ed.2d 1628 (1943) [Emphasis added].

The Court of Appeals rationalizes its decision in *Garcia* by declaring:

> "... Uniformity of characterization will not result in one limitations period being applied to all civil rights cases regardless of the state in which they arose . . ."

731 F.2d at 651 n4. However, this does not alter the fact that the rule of *Garcia* imposes a uniform statute of limitations upon all civil rights cases, whatever their genesis, within each State. Any regard for a state legislature's policies and considerations is either disdained or ignored by the Tenth Circuit in *Garcia*. *Garcia* seeks to look behind the authority of the states to some imagined "motivation" of their legislatures, indeed to some "possibility" of undesirable results to one party in the federal district courts, in making these assertions:

> "... Limitations periods . . . may well be motivated by a legislative desire to limit the liability of the public entity employer . . ." [2]

731 F.2d at 649. And,

> "... uneven application may cause the losing party to infer that the choice of a limitations period in his case was result oriented . . . This objectionable possibility is particularly undesirable in the context of socially sensitive civil rights litigation . . ."

Id. at 650.

These excerpts, and the entirety of the opinion, make clear that the Tenth Circuit's "own opinion about the wisdom or evil" of state law is at the heart of *Garcia*. *Garcia* is the penultimate of super-legislation by a federal court, for its rule effectively strikes down controlling state law relating to one particular application but not another; and the law is stricken not because it is unconstitutional or

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[2] Notably, 12 O.S. 1981, §95, Oklahoma's statute of limitations, was enacted in Statutes 1893, §3890, and codified in Oklahoma Revised Laws 1910, §4657 — preceding considerably this Court's landmark decision in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 51 L.Ed.2d 492 (1961)

otherwise unauthorized, but because it does not conform itself to the particular notions of federal values held by the Tenth Circuit at this time. *Garcia* compels the prescient observation of this Court in *Tomanio*, 446 U.S. 478, 491-492, 100 S.Ct. 1790, 1799:

> "Finally, we do not believe that this construction of congressional intent is overridden, as the Court of Appeals found, 'in the interests of advancing the goals of federalism.' We believe that the application of the New York law of tolling is in fact more consistent with the policies of 'federalism' invoked by the Court of Appeals than a rule which displaces the state rule in favor of an ad hoc federal rule . . ."

II. THE RULE AND RATIONALE OF *GARCIA* v. *WILSON* ARE IN DEROGATION OF THE LAW OF CONGRESS AND OF THIS HIGH COURT.

The rule set forth in *Garcia* rests upon a tripartite foundation. First:

> ". . . the facts establishing a Constitutional or statutory deprivation frequently are complex and peculiarly within the knowledge of the defendant. (citations omitted.) The plaintiff need not prove such facts to recover in a state law action. . . . Accordingly, a state's determination that a state claim should be governed by a particular limitations period to ensure accuracy in the fact finding process is not necessarily applicable to a federal claim arising out of the same incident . . ."

731 F.2d at 649. Second:

> "While we agree . . . that the state's judgment in setting limitations periods is typically concerned with fact finding accuracy and settled expectations, those purposes are not the only ones motivating the enact-

> ment of such statutes. Limitations periods . . . may well be motivated by a legislative desire to limit the liabilty of the public entity employer . . ."

Id. at 649. And most revealing is:

> ". . . attempting to determine which state claim is most nearly comparable is an uncertain task with no definitive answer."

Id. at 650.

Lack of uniformity makes the task uncertain only in requiring federal courts to carefully examine the basis of each claim in a case-by-case approach. Intimations that state legislators enact limitations periods, which often remain unaltered from statehood, with a design to circumvent federal rights under Section 1983, is simply unfounded in fact or in logic. Facts giving rise to the state or federal remedy, when arising out of the same incident, differ only in their federal constitutional import and in the requirement that the defendant have acted under color of state law. *These* elements are the focus of the federal remedy and, while complex, do not alter the underlying facts which may give rise to it. If an assault and battery is the factual basis of the federal claim, the same assault and battery is the factual basis of the state claim. What is different is the magnitude of injury and the remedy provided — not the facts themselves. While some underlying facts may be more difficult to analogize to state claims, these questions are justly resolved, within the lawful confines of Section 1988 and this Court's rulings, by applying the longer of the state limitations periods.

Congress has mandated that the applicable law of the states shall extend to and govern the federal courts as to

limitations periods upon federal civil rights claims. See 42 U.S.C. §1988, in light of federal silence upon the matter in 42 U.S.C. §1981, 1982, 1983, 1985. There is but one exclusive exception to this Congressional mandate — where such state law is "inconsistent with the Constitution and the laws of the United States." 42 U.S.C. §1988. The historical, philosophical and political considerations underlying the Civil Rights Act of 1871 has led this Court to hold of its later codification:

> "... The policies underlying §1983 include *compensation* of persons injured by deprivation of federal rights *and prevention* of abuses of power by those acting under color of state law."

Robertson v. *Wegmann*, 436 U.S. at 591, 98 S.Ct. at 1995 [Emphasis added]. This Court painstakingly outlined the importance of both state and federal policies of repose, accuracy of fact finding and settled expectations underlying state statutes of limitations in *Board of Regents* v. *Tomanio*, supra. This Court perceived nothing in these policies which is inconsistent with the Constitution or laws of the United States, nor with the specific policies underlying Section 1983. This Court found, rather, that state statutes of limitations are binding rules of law which Congress has instructed the federal courts to refer to in Section 1983 actions unless inconsistent with the policies expressed therein. See also *Robertson* v. *Wegmann*, supra. Examining the desire for uniformity as justification for displacement of otherwise applicable state rules of law, this Court has thrice held that need for uniformity does not warrant displacement of state statutes of limitations in federal civil rights actions. *Tomanio*, supra; *Robertson*, supra; *Johnson*, supra. Even where this Court has found uniformity to be paramount under

some federal actions, it has specifically excluded federal civil rights actions under Section 1983, finding:

> "... Section 1988 does not in terms apply to Bivens actions, and there are cogent reasons not to apply it to such actions even by analogy. Bivens defendants are federal officials brought into federal court for violating the Federal Constitution. No state interests are implicated by applying purely federal law to them. While it makes some sense to allow aspects of §1983 litigation to vary according to the laws of the States under whose authority §1983 defendants work, federal officials have no similar claim to be bound only by the law of the State in which they happen to work. (citation omitted) ..."

Carlson v. *Green*, 446 U.S. 14, 24 n.11, 100 S.Ct. 1468, 1474-1475, 64 L.Ed.2d 15 (1980).

There is, in fact, not one basis asserted in *Garcia* that this Court has not already rejected in interpreting the provisions of Section 1988 as they apply to Section 1983. The rationale of the case being contrary to law, so is its rule which has been thrust upon the six states comprising the Tenth Circuit.

CONCLUSION

Both the rule and the rationale of *Garcia* v. *Wilson* are violative of the Tenth Amendment to the United States Constitution and to the principles of federalism expressed therein; are violative of the mandate of Congress under 42 U.S.C. §1988; and are contrary to the law set forth by the United States Supreme Court.

The opinion of the Court of Appeals for the Tenth Circuit in *Garcia* v. *Wilson* must, therefore, be reversed by this Court.

Respectfully submitted,

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November, 1984

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER L. STEVAS,

No. 83-2146

In The

Supreme Court of the United States

October Term, 1984

RICHARD WILSON and MARTIN VIGIL,
Petitioners,

v.

GARY GARCIA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. When an action for the deprivation of constitutional rights is brought in federal court under 42 U.S.C. § 1983, may the federal court disregard the limitations period held applicable by the state's highest court to an identical action brought in state court under 42 U.S.C. § 1983, where the limitations period applied in state court is neither too short nor inconsistent with the Constitution and laws of the United States?

2. If the federal court may disregard the limitations period applied by the state's highest court to § 1983 actions filed in state court, what are the characteristics of an action under 42 U.S.C. § 1983 that the federal court must consider in identifying the most closely analogous cause of action and its applicable statute of limitations as required under *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975)?

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 731 F.2d 640 (10th Cir. 1984), and is reproduced as Appendix A to the Petition for Writ of Certiorari filed in this matter. (Pet. App. 1.) The opinion of the district court is not reported; it is reproduced as Appendix B to the Petition. (Pet. App. 28.)

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1984. (J.A. 2, 3). Petitioners filed their Petition for Writ of Certiorari on June 28, 1984. The Petition was granted by order of this Court on October 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following statutory provisions are relevant to the consideration of this matter: 42 U.S.C. § 1983, 42 U.S.C. § 1988, N.M. Stat. Ann. § 41-4-12 (1978), N.M. Stat. Ann. § 41-4-15 (1978), N.M. Stat. Ann. § 37-1-8 (1978), and N.M. Stat. Ann. § 37-1-4 (1978). The full text of each of these statutes is set forth in Appendix C to the Petition for Writ of Certiorari filed in this matter. (Pet. App. 46-48.)

STATEMENT OF THE CASE

Respondent Gary Garcia brought this action under 42 U.S.C. § 1983 (hereinafter § 1983) against Petitioners Richard Wilson, a former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police (hereinafter the Officers), seeking money damages for the alleged deprivation of constitutional rights arising out of Garcia's arrest by Officer Wilson. (J.A. 4-9.) Garcia alleged that Officer Wilson used excessive force in connection with the arrest, that Chief Vigil should not have allowed or caused Officer Wilson to be hired as a

New Mexico State Police Officer, and that Chief Vigil failed to provide adequate supervision. (J.A. 4-9.) According to the complaint, the incident in question occurred on April 27, 1979. (J.A. 5-6.) This action, however, was not filed until January 28, 1982—more than two years later. (J.A. 1.)

In response to Garcia's complaint, the Officers filed motions to dismiss on the ground that the action was barred by the applicable statute of limitations. (J.A. 10, 17.) In support of their motions, the Officers relied on the holdings and reasoning of *DeVargas v. State ex rel. New Mexica Department of Corrections,* 97 N.M. 447, 640 P.2d 1327 (Ct. App. 1981), and *DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 563, 642 P.2d 166 (1982). In the *DeVargas* cases, New Mexico's appellate courts reviewed the guidelines for selecting the statute of limitations applicable to an action brought under § 1983. Reasoning that under *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), a court must apply the limitations period applicable to the state cause of action most closely analogous to the action brought under § 1983, those courts ruled that the most closely analogous state cause of action in New Mexico to a police brutality action brought under § 1983 is set forth in section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978), which provides a cause of action against New Mexico law enforcement officers for assault, battery, or the deprivation of constitutional rights. The court therefore held that a § 1983 police brutality claim brought in state court against New Mexico law enforcement officers is governed by the two-year limitations period applicable to claims asserted under section 41-4-12. N.M. Stat. Ann. § 41-4-15 (1978); *DeVargas,* 97 N.M. at 564, 642 P.2d at 167.

On July 21, 1982, the trial court entered its order denying the Officers' motions. (J.A. 2; Pet. App. 45.) In its opinion, the court refused to follow the state court decisions in *DeVargas* (Pet. App. 42), holding instead that a § 1983 action is *sui generis* and not analogous to any state cause of action, including one brought under section 41-4-12. (Pet. App. 39-44.) The trial court characterized Garcia's claim as an "action on a statute" and held that since New Mexico has no statute of limitations specifically applicable to statutory actions, Garcia's claim would be governed by New Mexico's four-year residual statute of limitations applicable to an action not subject to any other specified period of limitations. N.M. Stat. Ann. § 37-1-4 (1978). (Pet. App. 44.)

Recognizing the conflict between its opinion and the position adopted by New Mexico's highest courts, the trial court certified the question for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). (Pet. App. 45.) On January 6, 1983, the Court of Appeals for the Tenth Circuit granted the Officers' request for leave to appeal. (R. 54.)

On March 30, 1984, the court of appeals sitting *en banc* issued its Memorandum Opinion and Order of Judgment. *Garcia v. Wilson,* 731 F.2d 640 (10th Cir. 1984). (Pet. App. 1.) In its opinion, the court rejected the trial court's characterization of § 1983 as an action on a statute. Nevertheless, the court of appeals affirmed the order of the trial court refusing to dismiss the complaint. Using this case as an opportunity to survey conflicting decisions within and outside the circuit on the applicability of state statutes of limitations to § 1983 actions, the Tenth Circuit adopted the view for statute of limitations purposes that all § 1983 claims within the circuit should be uniformly

characterized, without regard for state law, as actions for injury to personal rights. Accordingly, the court held that the appropriate limitations period for all § 1983 actions filed in New Mexico was that set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which provides a three-year limitations period for actions alleging "an injury to the person or reputation of any person." Consequently, the court concluded that Garcia's complaint was timely filed.

In its opinion, the Tenth Circuit acknowledged that its conclusion was at variance with the New Mexico Supreme Court's holding in *DeVargas,* but declined to follow that decision. 731 F.2d at 651-52 n.5. The Tenth Circuit also acknowledged that its approach to the statute of limitations issue conflicted with that adopted by at least three other circuits. *See, e.g., McClam v. Barry,* 697 F.2d 366 (D.C. Cir. 1983) (holding that § 1983 claims must be characterized for statute of limitations purposes by the underlying facts alleged in the plaintiff's complaint); *Aitchison v. Raffiani,* 708 F.2d 96, 101 (3d Cir. 1983) (reaffirming *Polite v. Diehl,* 507 F.2d 119, 122 (3d Cir. 1974) (*en banc*), which held that the limitations statute to be applied is the statute that would have been applied if the same or a similar action were filed in state court); *Kosikowski v. Bourne,* 659 F.2d 105 (9th Cir. 1981) (holding that a state's articulation of the limitations period specifically applicable to § 1983 claims is determinative of the federal issue and relieves the federal court from the task of characterizing a civil rights claim).

On June 28, 1984, the Officers filed a Petition for Writ of Certiorari with this Court. The Petition was granted on October 1, 1984.

SUMMARY OF ARGUMENT

I. Because federal law provides no limitations period for actions brought under 42 U.S.C. § 1983, the application of the forum state's law of limitations is required by 42 U.S.C. § 1988. *Board of Regents v. Tomanio.* New Mexico law, as expressed in *DeVargas,* applies a two-year limitations period, N.M. Stat. Ann. § 41-4-15 (1978), to § 1983 actions, such as the case at bar, which are founded on claims of police brutality. The court below erred in holding that it could ignore *DeVargas* and independently characterize this action. Characterizing an action to find an analogous state cause of action is simply a method used to ascertain state law; a federal court needs to engage in such an analysis only when state law is unclear. Furthermore, the characterization that state law would impose on this action should not be rejected unless inconsistent with federal law. *International Union v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966). In keeping with the principles of federalism incorporated in § 1988, a state's determination of an analogous cause of action should be respected. The strong federal interests reflected in § 1983 are protected by consideration of whether the applicable state law is inconsistent with the federal constitution or laws. *Burnett v. Grattan,* 104 S. Ct. 2924, 2928-29 (1984). Since section 41-4-15 neither provides a limitations period that is too short nor results in discrimination against the federal claim, the application of section 41-4-15 to this action would not be inconsistent with federal law or the policies of compensation and deterrence which underlie § 1983.

II. Even if a federal court is free to disregard state law on point in selecting an applicable statute of limitations, the court below nevertheless erred in failing to properly characterize the plaintiff's claims in order to identify the most closely analogous state cause of action. Specifically, the court below erred in failing to characterize this action within the framework of state law, according to the factors considered by New Mexico in formulating its policies of repose and statutes of limitations. *See Board of Regents v. Tomanio; Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454 (1975). Instead, the court of appeals adopted a uniform characterization of all § 1983 actions and thus identified an analogous state action without reference to the causes of action recognized by the state or how the state applies its statutes of limitations to those actions. Because the court below failed to give any deference to the policies and law of New Mexico, its attempt at uniform characterization results in an arbitrary decision having no application to the spirit and letter of § 1988's mandate to apply state law. A proper analysis of this issue leads to the conclusion that section 41-4-15 should apply to this action. The court below should therefore be reversed.

ARGUMENT

I. The Court Of Appeals Erred In Refusing To Apply To This Action The Statute Of Limitations Held Applicable By The New Mexico Supreme Court To An Identical Action Filed In State Court Under 42 U.S.C. § 1983.

Congress has not provided a specific limitations period to govern actions brought under 42 U.S.C. § 1983 (hereinafter § 1983). Section 1988 of title 42, however, provides

that where the provisions of that title are "deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State[s] . . . shall be extended to and govern" federal courts in the trial and disposition of any action brought under title 42. 42 U.S.C. § 1988 (hereinafter § 1988). Section 1988 further provides that state law may be disregarded only if found to be inconsistent with the constitution or laws of the United States. 42 U.S.C. § 1988; *Board of Regents v. Tomanio,* 446 U.S. at 485-86.

The determination of a rule of decision necessary for adjudication under § 1988 is a three-step process. *Burnett v. Grattan,* 104 S. Ct. at 2928-29. First, the court must determine whether there is suitable federal law; if no applicable federal law exists, the court must look to state law. Only after determining the state law does a court reach the third step, an analysis of whether the state law is inconsistent with the constitution and laws of the United States. It is this third step which principally protects the predominance of the federal interest. *Id.* The court below never reached the third step of the *Burnett* analysis because, in addressing the second step, it ignored state law on point, holding that it need not defer to or even consider the state's identification of the cause of action most analogous to the plaintiff's claim. In so doing, the court violated the mandate of § 1988. Because the court of appeals refused to apply to this § 1983 action the statute of limitations that would have been applied to the action had it been filed in state court, the judgment of the court below should be reversed.

A. The Court Below Erred in Undertaking an Independent Analysis To Find an Applicable Statute of Limitations Because § 1988 Directs That a State Determination of the Applicable Statute Should Not Be Rejected Unless It Is Inconsistent with Federal Law.

It is "now settled" that § 1988 requires federal courts to look to state law in resolving issues of limitations in actions brought under § 1983. *Burnett v. Grattan,* 104 S. Ct. at 2929. The determination that is to be made in such cases has been described in a variety of ways. *Id.* This Court has alternatively identified the applicable statute of limitations as the "most appropriate [statute of limitations] provided by state law," *Johnson v. Railway Express,* 421 U.S. at 462, the statute "governing an analogous cause of action," *Board of Regents v. Tomanio,* 446 U.S. at 483-84, and the statute "which the State would apply if the action had been brought in a state court," *Johnson v. Railway Express,* 421 U.S. at 469 (Marshall, J., concurring in part and dissenting in part). *Burnett,* 104 S. Ct. at 2929. Each of these descriptions, however, merely expresses the result sought by § 1988: the application of the proper state law. If a state has specifically addressed, and answered, the question of "which [statute of limitations] the State would apply if [a § 1983] action had been brought in a state court," a federal court need go no further in ascertaining the applicable state law: § 1988 requires that the court respect the state's selection of a limitations period unless to do so would be inconsistent with federal law. 42 U.S.C. § 1988; *see Runyon v. McCrary,* 427 U.S. 160 (1976); *Johnson v. Railway Express.*

1. New Mexico law holds that the state cause of action most analogous to the plaintiff's § 1983 claims in this case is an action brought under N.M. Stat. Ann. § 41-4-12, to which the limitations period of N.M. Stat. Ann. § 41-4-15 applies.

In *DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 563, 642 P.2d 166 (1982), the New Mexico Supreme Court held that a § 1983 action for alleged police brutality brought in state court was governed by the two-year statute of limitations set forth in N.M. Stat. Ann. § 41-4-15 (1978). *See DeVargas v. State ex rel. New Mexico Department of Corrections,* 97 N.M. 447, 451, 640 P.2d 1327, 1331 (Ct. App. 1981), *cert. quashed,* 97 N.M. 563, 642 P.2d 166 (1982) (hereinafter cited as *De Vargas* (Ct. App.)). That statute provides that "[a]ctions against a governmental entity or a public employee for torts shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death. . . ." N.M. Stat. Ann. § 41-4-15 (1978).

DeVargas involved an action brought in state court under § 1983. In his complaint, the plaintiff in *DeVargas* alleged that he had been deprived of federal constitutional rights as a result of a beating he had received from employees of the New Mexico Department of Corrections while he was incarcerated at the state penitentiary. *DeVargas* (Ct. App.), 97 N.M. at 449, 640 P.2d at 1329. The trial court denied a motion to dismiss the complaint as untimely; the court of appeals reversed. Although the court of appeals did not adopt a specific period of limitations for the plaintiff's action, the court stated, "In our opinion, the two-year period [of § 41-4-15] is the applicable

limitation period to plaintiff's claims against [the Warden of the Penitentiary] under § 1983." 97 N.M. at 451, 640 P.2d at 1331.

On certiorari, the New Mexico Supreme Court agreed.[1] In its opinion, the supreme court held that the state cause of action "most closely analogous" to the § 1983 action before the court was an action brought under section 41-4-12 of the New Mexico statutes, N.M. Stat. Ann. § 41-4-12 (1978) (hereinafter section 12). Section 12 imposes liability against law enforcement officers for personal injury, bodily injury, wrongful death or property damage resulting from, *inter alia,* assault, battery or the deprivation of federal or state constitutional rights. Since N.M. Stat. Ann. § 41-4-15 (hereinafter section 15) provides a two-year statute of limitations for actions brought under section 12, 97 N.M. at 564, 642 P.2d at 167, the New Mexico Supreme Court held that this same two-year limitations period should and would apply to a § 1983 action brought in state court which was founded on claims of police brutality.

The instant case is virtually identical to *DeVargas.* As in *DeVargas,* the plaintiff in this case bases his § 1983 action on claims of police brutality; the incidents giving rise to the plaintiff's action occurred in New Mexico; and the plaintiff's complaint was brought against New Mexico law enforcement officers. Since the plaintiff here filed his complaint over two years after his cause of action accrued, his complaint, if filed in state court, would have been untimely under *DeVargas.*

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[1] The published opinion of the New Mexico Supreme Court in *DeVargas* was issued as the court's decision quashing its writ of certiorari.

Despite the admonition of this Court that a federal court must "[rely] on the State's wisdom in setting a limit . . . on the prosecution" of a federal civil rights claim, *Johnson v. Railway Express,* 421 U.S. at 464, the court of appeals refused the guidance of the New Mexico courts in *DeVargas.* The court ruled instead that any § 1983 action filed in a federal court sitting in New Mexico would be governed not by the two-year period set forth in section 15, but by the three-year period set forth in section 37-1-8 of the New Mexico statutes, N.M. Stat. Ann. § 37-1-8 (1978), which governs actions for injuries to the person. Without finding that the state court's determination in *DeVargas* was inconsistent with federal law, the court below baldly dismissed in a footnote the determination by the state court of the state's most analogous cause of action and substituted its independent analysis of the most analogous state law. In so doing, the Tenth Circuit failed to follow the prescript of this Court and invaded the unique province of the state courts.

2. In applying a state's statutes of limitations, a state court's characterization of a federal claim for the purpose of identifying an analogous state action should not be rejected unless it is inconsistent with federal law.

The court below attempted to justify ignoring *DeVargas* on the ground that it was entitled to "characterize" a § 1983 action without reference to state law. 731 F.2d at 651-52 n.5. The process of characterizing a federal claim for the purpose of identifying the most closely analogous state cause of action, however, is simply a tool which courts have historically used when state law is unclear in order to effectuate § 1988's mandate to apply state law. *See Runyon v. McCrary.* As the Court of Appeals for the

Ninth Circuit held in *Kosikowski v. Bourne,* "[c]haracterization serves no purpose other than to provide guidance in the selection of the applicable state statute. When the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by the federal law upon which the plaintiff's claims rest." 659 F.2d at 107.[2]

The role that characterization plays in the process of selecting a state statute of limitations can best be understood in the context of § 1988 and the case law interpreting that statute. Given that § 1988, by its terms, requires a federal court to apply state law, "[t]he applicable period of limitations is derived from that which the state would apply if an action seeking similar relief had been brought in a state court." *Johnson v. Railway Express,* 421 U.S. at 469 (Marshall, J., concurring in part and dissenting in part). If that limitations period has been identified by the

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[2] In *Kosikowski,* the Ninth Circuit held that the two-year statute of limitations contained in the Oregon Tort Claims Act governed an action brought in federal court under 42 U.S.C. § 1983. Although that court previously had ruled that § 1983 actions filed in Oregon were governed by the six-year limitations period applicable to causes of action created by statute, *Clark v. Musick,* 623 F.2d 89 (9th Cir. 1980), the court in *Kosikowski* held that it was bound by legislation enacted after its decision in *Clark* by which the state legislature evidenced an intent that § 1983 actions be governed by the limitations period set forth in the Oregon Tort Claims Act. "This precise expression of the intent of the Oregon Legislature makes unnecessary a resort to a characterization of appellants' cause of action in the manner employed by this court in [*Clark*]." 659 F.2d at 107. *See Burnett v. Grattan* (Rehnquist, J., concurring). The Tenth Circuit, in its opinion below, specifically rejected the Ninth Circuit's holding in *Kosikowski.* 731 F.2d at 649. The Tenth Circuit, therefore, has held in effect that no expression of state law would be sufficient to warrant consideration in determining a limitations period for § 1983 actions.

state, either through legislation or case law, the federal court must apply the same statute of limitations unless to do so would be inconsistent with federal law. *Burnett v. Grattan,* 104 S. Ct. at 2935 (Rehnquist, J., concurring); *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 64 (1981); *Runyon v. McCrary; Johnson v. Railway Express; International Union v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1966); *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.,* 698 F.2d 676 (4th Cir. 1983); *Aitchison v. Raffiani.* If, however, the state has not identified the limitations period it would apply if the action were brought in state court, the federal court must attempt to identify the appropriate state statute of limitations by referring to the limitaions period applicable to the most analogous state cause of action.[3] *Board of Regents v. Tomanio.* Characterization is merely a method used to identify the state's most analogous cause of action if the state itself has not already done so.[4] *See Runyon v. McCrary; Jones v. Orleans Parish*

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[3] Justice Rehnquist, in his concurring opinion in *Burnett v. Grattan,* characterized the issue before the Court as a question of whether the state intended the six-month limitations period at issue to apply to the federal civil rights claims raised in that case. 104 S. Ct. at 2936. Since the intent of a legislature, if not express, can best be determined by an analysis of how the state applies and interprets its own statutory scheme of limitations, a state's characterization of an action filed in state court under § 1983 as analogous to one of its own causes of action for statute of limitations purposes is determinative of the state's intent.

[4] Section 1988 requires a federal court to apply state law; § 1988 does not speak of analogous causes of action or of characterization. Because New Mexico law is clear, the instant case is the most straightforward of all the § 1983 statute of limitations cases decided by this Court in recent years. In cases

(Continued on next page)

School Board, 679 F.2d 32, 35, *modified,* 688 F.2d 342 (5th Cir. 1982), *cert. denied,* 103 S. Ct. 2420 (1983); *Warren v. Norman Realty Co.,* 513 F.2d 730 (8th Cir. 1975).

The term "characterization" was first used in connection with the process of identifying a state statute of limitations applicable to a federal claim in *International Union v. Hoosier Cardinal Corp.* In that case, the Court held that state statutes of limitations governed actions brought under § 301 of the Labor Relations Act. In choosing the appropriate state statute of limitations to apply to the matter before it, the Court held that even if, under federal law, a "§ 301 suit must be regarded as exclusively bottomed upon the written collective bargaining agreement," the characterization that Indiana law would impose on a § 301 claim in applying its own statutes of limitations should not be rejected by a federal court when searching for an appropriate limitations period.

> We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. . . . *But there is no reason to reject the characterization that state law would impose unless that char-*

(Continued from previous page)

previously decided, e.g., *Burnett v. Grattan; Chardon v. Fumero Soto,* 462 U.S. 650 (1983); *Board of Regents v. Tomanio; Johnson v. Railway Express; see also Robertson v. Wegmann,* 436 U.S. 584 (1978); *Runyon v. McCrary,* the state rule of decision was unknown because in each case neither the state legislature nor the state appellate courts had addressed the issue. Given this uncertainty regarding the state rule, the courts in each case had to make independent decisions about which limitations period to apply. Here, however, New Mexico law is clear on the specific question presented. The federal courts are therefore relieved of having to undertake the sometimes difficult process of characterizing the plaintiff's claim in an effort to find the most analogous state cause of action and then identifying the limitations period applicable to that action.

acterization is unreasonable or otherwise inconsistent with national labor policy.

383 U.S. at 706 (emphasis added, citations omitted). Finding that Indiana would characterize the claim before the Court as an action founded at least in part on individual oral contracts of employment, the Court held that the action before it was governed by the Indiana statute of limitations applicable to actions on unwritten contracts.

While the court of appeals in its opinion below cited *Hoosier Cardinal* for the proposition that "[c]haracterization of such a federal claim is a matter of federal law," 731 F.2d at 642, the court completely ignored this Court's caveat that a state's characterization of the federal claim should not be rejected unless found to be inconsistent with federal law.[5] Since the court below refused to acknowledge that New Mexico's characterization of a § 1983 action in the context of applying its own statutes of limitations was even relevant to its decision, the court's analysis is fundamentally erroneous and must be rejected. *See Runyon v. McCrary*, 427 U.S. at 181 (the selection of a statute of limitations in a federal civil rights action is a "situation in which a federal right depend[s] upon the interpretation of state law"); *McNutt v. Duke Precision*, 698 F.2d at 679 ("Had there been in Maryland a decision or body of decisions on the subject [of the appropriate limitations

[5] This Court in *Hoosier Cardinal* was concerned with adopting a limitations period for a federal claim in the face of congressional silence. The Court, inferring from this silence a congressional intent to look to state law in selecting an appropriate limitations period, deferred to the state's characterization of the federal claim when applying the state's own law of limitations. The case for deference would seem even stronger in a civil rights action, where the reference to state law is explicit. 42 U.S.C. § 1988; *Board of Regents v. Tomanio.*

period in a § 1981 action] which were not discriminatory in their result, we would probably accept them as the common law of the State of Maryland, for we are authorized by § 1988 to apply her common law as well as statutes.").

Although both the trial court and the court of appeals in the case at bar refused to follow *DeVargas,* neither court found that the application of the statute of limitations identified therein would be inconsistent with federal law or even inappropriate.[6] The court of appeals, in fact, did not feel compelled even to address *DeVargas.* Stating that "we are unwilling to hold that a state's articulation of the limitations period specifically applicable to section 1983 claims . . . relieves the federal courts from characterizing a civil rights claim as a matter of federal law," 731 F.2d at 649, the court dismissed *DeVargas* in a footnote: "Because the conclusion reached in *DeVargas* is at variance with our analysis in this case, we do not adopt it." 731 F.2d at 652 n.5.

The court's cavalier dismissal of *DeVargas* is inappropriate. The application of state limitations law in § 1983 actions is mandatory, not permissive. 42 U.S.C. § 1988; *Board of Regents v. Tomanio.* Once the state has resolved the issue of which of its statutes of limitations is applicable to a § 1983 action, the role of the federal court

[6] Indeed, the trial court found that "the method of characterization adopted in *DeVargas* is not without appeal. Courts are frequently faced with cases involving fact patterns similar to that before the New Mexico courts in *DeVargas:* alleged deprivation of constitutional rights committed by law enforcement . . . officers under color of state law. In such cases, cogent arguments can be made that [claims under section 12] are most closely analogous to those types of § 1983 claims." (Pet. App. 42-43.)

is to determine whether the application of that statute is inconsistent with the constitution or laws of the United States. *See Burnett v. Grattan,* 104 S. Ct. at 2929. The tripartite analysis endorsed by this Court in *Burnett* and earlier cases incorporates the principal means of preserving the predominance of the federal interest. By recognizing a state's interpretation of its own law, a federal court gives proper deference to a state's right to define its legislative acts; by then asking whether the state law is in any way inconsistent with the federal constitution or laws, a federal court protects the federal interest in the federal cause of action.

3. The lower court's failure to defer to state law in the application of the state's own statute's of limitations violates the principles of federalism incorporated in § 1988.

As this Court has recognized, the congressional intent to apply state law expressed in § 1988 is entirely consistent with principles of federalism. In *Board of Regents v. Tomanio,* for instance, this Court held that

> [T]he application of the New York law of tolling is in fact more consistent with the policies of "federalism" invoked by the Court of Appeals, than a rule which displaces the state rule in favor of an ad hoc federal rule. . . . Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. § 1983. . . . But the Court of Appeals' rule allowing tolling can scarcely be deemed a triumph of federalism when it necessitates a rejection of the rule actually chosen by the New York Legislature.

446 U.S. at 491-92 (citations omitted). *See Younger v. Harris,* 401 U.S. 37, 44-45 (1971) (recognizing "a system

in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States"). By claiming the right to independently characterize a § 1983 action, thereby disregarding any state law on point, the court of appeals has essentially created exactly the kind of "ad hoc federal rule" rejected by this Court in *Tomanio.*

Rather than achieving uniformity or harmonizing § 1983 jurisprudence with comparable state law, the Tenth Circuit's decision creates an irreconcilable conflict between federal and state courts without serving any overriding federal interest. As a result of the Tenth Circuit's decision, the choice of the statute of limitations that will govern a § 1983 action against law enforcement officers in New Mexico depends solely on whether the action is filed in federal or state court.[7] This is precisely the sort of result federal courts have attempted to discourage since *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

The rule that the Tenth Circuit disregarded in this case is clear: § 1988 requires the application of state law, including both common law and statutory law. How New Mexico would apply its own statutes of limitations is a

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[7] In addition to providing a remedy for the deprivation of federal constitutional rights, section 12 creates a cause of action for the deprivation of rights arising under the Constitution of the State of New Mexico. If the court below is affirmed, litigants would be allowed only two years to bring an action for the deprivation of rights arising under the state constitution but three years to bring an action in federal court arising under the federal constitution.

question uniquely suited to resolution by New Mexico courts. *See Major v. Arizona State Prison,* 642 F.2d 311, 313 (9th Cir. 1981). "No rule is more firmly established than that this court will follow the construction given by the supreme court of a state to a statute of limitations. . . ." *Dibble v. Bellingham Bay Land Co.,* 163 U.S. 63, 73 (1896). *See Chattanooga Foundry & Pipe Works v. City of Atlanta,* 203 U.S. 390, 397-98 (1906); *Leffingwell v. Warren,* 67 U.S. (2 Black) 599, 603 (1862); *cf. Runyon v. McCrary,* 427 U.S. at 181 (the "federal right depend[s] upon the interpretation of state law"; resolution of issue is "heavily contingent upon an analysis of state law"). The relevant factor for the federal court is that the state has made a determination regarding the applicable statute of limitations; "[w]hen the state has expressly made that selection the federal courts should accept it unless to do so would frustrate the purposes served by federal law . . . ." *Kosikowski v. Bourne,* 659 F.2d at 107. *See McNutt v. Duke Precision.*

The Supreme Court of New Mexico has made a definitive decision that a § 1983 action for alleged police brutality in New Mexico is governed by the two-year limitations period set forth in N.M. Stat. Ann. § 41-4-15 (1978). Application of that limitations period is reasonable and consistent with federal law. The courts below therefore erred in not applying that statute to the plaintiff's claims.

B. The Application of N.M. Stat. Ann. § 41-4-15 (1978) to a Civil Rights Claim Is Not Inconsistent with the Constitution and Laws of the United States or the Policies Underlying § 1983.

A state's determination of the statute of limitations applicable to a § 1983 claim is controlling unless that limitations period is inconsistent with the constitution or laws of the United States. *See* discussion *supra* Point I(A) and 42 U.S.C. § 1988. A determination of whether there is an inconsistency between application of the state limitations period and federal law is subdivided into two issues: first, does the state statute provide an unduly short period which would undermine the federal right, and second, does the state statute discriminate against a federal right by providing a longer limitations period for an analogous state right. *Campbell v. City of Haverhill,* 155 U.S. 610, 615 (1895); *see Burnett v. Grattan* (Rehnquist, J., concurring); *Pufahl v. Parks,* 299 U.S. 217 (1936). In this case, the application of section 15 results neither in a period that is too short nor in one that discriminates against the federal cause of action.

The two-year period provided in section 15 is not *per se* too short, nor have the respondents argued that it is. This Court upheld the application of a two-year statute of limitations to § 1981 claims in *Runyon v. McCrary,* and suggested that a one-year statute was acceptable in *Johnson v. Railway Express* (affirming dismissal of a claim under 42 U.S.C. § 1981 under Tennessee's one-year limitations period). A two-year limitations period allows a plaintiff sufficient time to marshal the information necessary to file a complaint, *see Burnett v. Grattan,* and thus is consistent with the federal policies behind § 1983—the compensation of persons injured by the deprivation of their federal rights and the prevention of abuses of power by those acting under color of state law. *Robertson v. Wegmann,* 436 U.S. at 591.

Nor does the application of section 15 discriminate against the federal cause of action. It provides precisely

the same period of limitations for actions arising under the constitution and laws of New Mexico as it does for actions arising under the constitution and laws of the United States. Section 12, the underlying cause of action found by the state to be most analogous to a § 1983 claim, imposes liability in actions against law enforcement officers for the "deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico" as well as for state law claims for "personal injury, bodily injury, wrongful death or property damage."

The applicability of sections 12 and 15 to state and federal claims alike differentiates the statute at issue in the case at bar from those at issue in cases such as *Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978). In *Johnson*, the court held that Virginia's one-year statute of limitations, applicable only to federal civil rights actions, constituted an unfounded discrimination against the federal cause of action and was inconsistent with Virginia's scheme of limitations. The statute at issue in the case at bar, however, applies equally to federal and state claims. In addition, that statute is consistent with New Mexico's scheme of limitations. Like other limitations periods, section 15 is based on a number of factors, including the underlying facts of a claim, the parties involved, and the nature of the right violated. *See* discusssion *infra* at Point II(B). Thus section 15, unlike the statute at issue in *Johnson*, does not single out the federal claim and does not, in a manner inconsistent with the entire limitations scheme of the state, apply a shorter period of limitations to federal claims than to state claims.

Deterrence and compensation have been recognized as the principal federal policies furthered by the federal

civil rights laws. *Board of Regents v. Tomanio*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. at 590. In *Wegmann*, the Court identified three factors which demonstrated that application of the state rule of law in that case would be consistent with both of these policies; significantly, all three factors are also present in the case at hand. First, as in *Wegmann*, the application of the state rule of law is not inconsistent with policies of compensation or deterrence. *Board of Regents v. Tomanio.* The two-year limitations period imposed by state law addresses the initiation of court proceedings and provides an adequate period of time within which a plaintiff may seek relief. *See Burnett v. Grattan.* Second, application of the state rule will not automatically defeat all federal civil rights claims to which the rule is applied. Indeed, "neither of these policies [deterrence and compensation] is significantly affected by" the application of this limitations period since "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence" simply by commencing their actions within two years. *Board of Regents v. Tomanio*, 446 U.S. at 488; *see also Burnett v. Grattan.* Third, as in *Wegmann*, federal statutes impose like constraints: federal law provides similar periods of limitations for similar actions. *See* 42 U.S.C. § 1986 (one-year statute of limitations); 28 U.S.C. § 2680(h) and 28 U.S.C. § 2401(b) (two-year limitations period for actions against federal law enforcement officers for assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution).

The mere fact that the plaintiff is barred from recovery is not sufficient ground to declare state law "inconsistent" with federal law. *Robertson v. Wegmann*, 436 U.S. at 594-95. Because a two-year period of limitations

is neither too short nor discriminatory, it would be improper to reject the state's determination that a § 1983 claim is most analogous to a claim under section 12.

II. Even If A Federal Court Is Free To Ignore The Determination Made By A State's Highest Court Of The State Cause Of Action Most Analogous To § 1983, The Court Below Erred In Failing To Find That N.M. Stat. Ann. § 41-4-12 Is The State Cause Of Action Most Analogous To This Action And In Failing To Apply To The Plaintiff's Claims The Limitations Period Set Forth In N.M. Ann. § 41-4-15.

This Court, in *Board of Regents v. Tomanio,* held that the statute of limitations applicable to an action filed under § 1983 is that statute of limitations applicable to the most analogous state action. 446 U.S. at 483-84. The purpose of identifying the most analogous state action is to enable the court to identify the statute of limitations that "would have been applied to the action if it had been brought in a state court." See *supra* Point I. Thus, if a specific statute has not been selected by a state as one applicable to an action filed under § 1983, it becomes incumbent on the federal court to determine the state action that would be most analogous to the case before it and to use the limitations period that would be applicable to that state action. In the instant case, however, the courts below not only ignored the state's controlling choice of a limitations period, they also refused to identify an analogous cause of action within the context of state law as required by *Tomanio.* Thus, even if the New Mexico Supreme Court's decision in *DeVargas* is not dispositive of this case, the court below erred in refusing to follow appropriate guidelines for selecting, in the absence of a controlling state

decision, the limitations period applicable to a § 1983 action.

A. The Characterization of a § 1983 Action Should Properly Be Undertaken in the Context of the State's Scheme of Limitations, Taking into Account the Factors Considered by the State in Effecting the Balancing of Policies Relevant to Issues of Repose.

The trial court and the court of appeals disagreed on the appropriate characterization of an action brought under § 1983. The trial court characterized the action as "an action on a statute," while the court of appeals characterized it as "an action for injury to personal rights." The characterization processes that both the Tenth Circuit and the trial court employed, however, suffer from the same defect: both courts characterized all § 1983 actions uniformly without reference to the state's scheme of limitations or to the factors considered relevant by each state in enacting its statutes.

The problem with the approach taken by the courts below is this: state statutes of limitations cannot be applied in a vacuum. The varying periods of limitations provided by state law represent society's necessary value judgment, a balancing of a plaintiff's right to recover in a given action and society's interest in prohibiting the prosecution of a stale claim. *Board of Regents v. Tomanio.* Statutes of repose are therefore integrally related to the nature of the actions they affect and vary in length of time because different periods of time affect fact-finding accuracy and settled expectations in differing degrees depending on the factual nature of the action and the parties

involved in the suit. Limitations periods, for example, may respond to the varying needs of preserving evidence, *see Aitchison v. Raffiani,* 708 F.2d at 103 (noting that "the problem of preserving evidence may be more difficult when the defendant is an elected body whose members serve for relatively short terms"), and often incorporate public policies such as those relating to fiscal responsibility, *Espanola Housing Authority v. Atencio,* 90 N.M. 787, 789, 568 P.2d 1233, 1235 (1977) (shorter statutes of limitations for public defendants are justified because they reduce insurance rates and promote tax collection efficiency by assuring more accurate fiscal planning).

A single statute of limitations thus cannot be fully understood or correctly applied unless considered in the context of the causes of action recognized by the state and how the state applies its statutes of limitations to those actions. *Board of Regents v. Tomanio; Runyon v. McCrary; Aitchison v. Raffiani; see Jones v. Orleans Parish School Board*; *Major v. Arizona State Prison.* Characterizing an action outside of this context results in an arbitrary selection of a statute of limitations unrelated to any policies of repose considered by the state in enacting its limitations scheme. *See Board of Regents v. Tomanio; Johnson v. Railway Express,* 421 U.S. at 463. If state law is to be applied at all in § 1983 actions, it should be applied in a reasoned fashion. Given that § 1988 borrows not only the time limits imposed by state law but also the policies that these time limits embody, *Board of Regents v. Tomanio,* the characterization of an action for the purpose of identifying an analogous state action should be based on the various factors considered by each state to be important in implementing its policies of repose.[8] *Aitchison v. Raffiani; Ammlung v. City of Chester,* 494 F.2d 811, 814 (3d Cir. 1974); *McClam v. Barry; see Board of Regents v. Tomanio,* 446 U.S. at 487.

If a state's scheme of limitations incorporates different limitations periods for factually distinct common law claims, these distinctions, based on the underlying conduct alleged, should be respected in characterizing an action for statute of limitations purposes.[9] *See, e.g., Suthoff v. Yazoo*

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[8] The emphasis placed by this Court in *Tomanio* and *Johnson* on the fact-finding process, settled expectations, and the implementation of state policies of repose supports the proposition that the characterization of a § 1983 claim must be made in the context of state law. "On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations. Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio,* 446 U. S. at 487.

[9] If two claims, such as "common-law assault and constitutional assault (as alleged here), are so alike that 'plaintiffs can be expected to plead [the] common law [claim] as a pendent claim in constitutional suits,' . . . then the same judgment about repose applies to both claims." *McClam v. Barry,* 697 F.2d at 375. There is little justification for establishing different periods of limitations for factually similar claims against the same defendants. *Id. White v. United Parcel Service,* 692 F.2d 1 (5th Cir. 1982), *cert. denied,* 104 S. Ct. 186 (1983); *Miller v. City of Overland Park,* 231 Kan. 557, 646 P.2d 1114, 1118 (1982) ("the very reason for § 1988 and the application of state periods of limitation to § 1983 actions is to avoid [the] inconsistency" that would result from applying "a different statute of limitations than that provided by the state for a common law or state statutory action on the identical set of facts"). *See, e.g., Cowdrey v. City of Eastborough, Kansas,* 730 F.2d 1376 (10th Cir. 1984) (holding constitutional claims based on false arrest and wrongful detention timely under two-year limitations period while dismissing factually identical claims pursuant to one-year limitations period).

County Industrial Development Corp., 722 F.2d 133 (5th Cir. 1983); *Gashgai v. Leibowitz*, 703 F.2d 10 (1st Cir. 1983); *McClam v. Barry; Kilgore v. City of Mansfield*, 679 F.2d 632 (6th Cir. 1982); *Polite v. Diehl.* Similarly, if a state recognizes a specific period of limitations for actions against a certain class of defendants, then this fact too should be taken into account. *Foster v. Armontrout*, 729 F.2d 583 (8th Cir. 1984); *Aitchison v. Raffiani; Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982); *see Burnett v. Grattan*, 104 S. Ct. at 2934 (Rehnquist, J., concurring); *cf. Robertson v. Wegmann.* If, as the Tenth Circuit held, the constitutional nature of the right violated in a § 1983 action was to be of overriding importance in selecting a state statute of limitations, "the Court would, presumably, have said so, and would not have directed that the period chosen be that applicable to a 'closely analogous claim.'" *McClam v. Barry*, 697 F.2d at 373 (holding that while "constitutional claims differ from closely analogous common law claims in the interests they protect, in their elements and origins, and in their importance," these differences do not require rejection of the local limitations period for the factually analogous common law cause of action).[10]

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[10] Prior to its ruling below, the Tenth Circuit had consistently held that the characterization of a civil rights action for the purpose of selecting a state statute of limitations should be made in the context of state law, with reference to "the particular allegations of the claim" alleged. *Jackson v. City of Bloomfield*, 731 F.2d 652, 653 (10th Cir. 1984). The case of *Zuniga v. AMFAC Foods, Inc.*, 580 F.2d 380, 383 (10th Cir. 1978), *overruled in EEOC v. Gaddis*, 733 F.2d 1373 (10th Cir. 1984), decided by the Tenth Circuit in 1978, is illustrative. In that case, the Tenth Circuit held that the "most analogous state action" for the purpose of selecting a statute of limitations is that cause of action which would arise under state law out of the underlying conduct on which a plaintiff bases his claim.

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The court below attempted to justify its blanket characterization of § 1983 actions without reference to individual state law by citing a need for uniformity in the federal courts. This Court, however, specifically has ruled that "[t]he need for uniformity, while paramount under some federal statutory schemes, has not been held to warrant the displacement of state statutes of limitations for civil rights actions." *Board of Regents v. Tomanio*, 446 U.S. at 489; *Robertson v. Wegmann*, 436 U.S. at 592-93 and 593 n.11. The court below also expressed concern over the possibility of confusion resulting from having to select an analogous state action within the context of the state's scheme of limitations. This analysis, however, involves nothing more than the analysis involved in any other federal action for which no statute of limitations is provided, *see International Union v. Hoosier Cardinal Corp.*, or, for that matter, in any diversity case, *see Bauserman v. Blunt*, 147 U.S. 647 (1893). The problem raised by the court is hardly unique; it is precisely the dilemma faced by every litigant in virtually every action filed in state court.

If this Court had intended that all § 1983 actions be uniformly characterized as actions on a statute or actions for personal injury, it could have dispensed with its mandate to examine analogous state causes of action and simply instructed the courts to determine whether a state has a

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In so holding, the court in *Zuniga* specifically rejected the view that all civil rights actions should be characterized uniformly for the purpose of selecting an appropriate statute of limitations. 580 F.2d at 383. The court of appeals, in its opinion below, rejected the factual approach to characterization adopted in *Zuniga*, not, apparently, because *Zuniga* was wrongly decided, but because its application was difficult. 731 F.2d at 649-50.

statute of limitations applicable to "actions on a statute" or "actions for injuries to personal rights."[11] *See Burnett v. Grattan,* 104 S. Ct. at 2934 (Rehnquist, J., concurring); *Runyon v. McCrary; McClam v. Barry.* As this Court has noted, however, there really is nothing "peculiar to a federal civil rights action that would justify special reluctance in applying state law." *Johnson v. Railway Express,* 421 U.S. at 464. The court below therefore erred in refusing to determine the action under state law that would be analogous to the plaintiff's claims and then to apply to this action the statute of limitations applicable to that analogous state action.

B. N.M. Stat. Ann. § 41-4-12 (1978) Provides the State Cause of Action Most Analogous to the Plaintiff's § 1983 Claims Because the Plaintiff Seeks Damages for the Deprivation of Constitutional Rights Arising out of an Assault and Battery by a Law Enforcement Officer and That Statute Provides That a Plaintiff May Recover Damages from a Law Enforcement Officer for Assault, Battery or the Deprivation of State or Federal Constitutional Rights.

Even if the federal courts were not bound by New Mexico's express choice of a two-year limitation for § 1983 actions against law enforcement officers, this action should

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[11] The anomalous results which obtain when an action is characterized independently of state law are illustrated by the fact that at least two states in the Tenth Circuit have no statute of limitations applicable to "actions for injury to personal rights." *See McKay v. Hammock,* 730 F.2d 1367 (10th Cir. 1984) (Colorado); *Mismash v. Murray City,* 730 F.2d 1366 (10th Cir. 1984) (Utah).

have been dismissed. If the courts below had correctly undertaken an independent search for the applicable statute of limitations, they would have concluded, as did the *DeVargas* court, that section 12 of the New Mexico Tort Claims Act, N.M. Stat. Ann. § 41-4-12 (1978), embodies the state cause of action most analogous to this action. The specific provisions of section 12 clearly demonstrate that an action brought under that section is more analogous to the § 1983 claims raised in this case than a generalized action for injuries to personal rights. The court of appeals' adoption of § 37-1-8 as the statute of limitations that applies to this case therefore ignores the state's judgment that the two-year limitations period applicable to actions brought under Section 12 more appropriately governs claims such as those raised by the plaintiff.

Section 1983 provides a remedy for assaults by police officers resulting in the "deprivation of any rights, privileges, or immunities secured by the constitution and laws of the United States when caused by" persons acting under color of state law. Similarly, section 12 provides a remedy for assault, battery and the deprivation of any "rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties." N.M. Stat. Ann. § 41-4-12 (1978).

If the New Mexico Legislature had drafted section 12 for the sole purpose of creating a state forum for a cause of action analogous to a federal cause of action against law enforcement officers under § 1983, it would be difficult to conceive of the legislature using language different from the language of section 12. The relevant portions of section 12 are identical in all material respects with the lan-

guage of 42 U.S.C. § 1983.[12] Section 12, in fact, provides the state counterpart to § 1983: it creates a private right of action for the deprivation of New Mexico constitutional rights.

In addition, the plaintiff's constitutional claims in this case arise out of an assault and battery by a law enforcement officer. Since section 12 imposes liability for injuries[13] resulting from an assault or battery by a law enforcement officer, the common law cause of action most analogous to the plaintiff's § 1983 action is set forth in section 12.

Section 15 provides a two-year limitations period for "actions against a governmental entity or public employee for torts,"[14] and applies to all actions brought under

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12 The operative language of the two statutes is as follows:

42 U.S.C. § 1983

Every person who, under color of [state law] . . . causes . . . the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

N.M. Stat. Ann. § 41-4-12 (1978)

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for . . . deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

13 Section 12 distinguishes between personal injury and bodily injury, and compensates both.

14 Thus, whether this action is characterized as a constitutional or assault and battery claim under section 12, or as any common law tort, or for that matter as an injury to personal rights, section 15 applies to the plaintiff's claims.

section 12, *DeVargas*, 97 N.M. at 564, 642 P.2d at 167. Although dicta in *Burnett* suggests that certain state policies might be irrelevant to the selection of a state statute of limitations, 104 S. Ct. at 2932 n. 18, *but cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (recognizing distinction among defendants for the purpose of awarding punitive damages), no question has been raised in this matter regarding the propriety of applying to this action a statute of limitations which is applicable to a specific entity. Indeed, decisions of this Court appear to require that the identity of the party sued be taken into account in selecting a state statute of limitations in a § 1983 action if the state itself considers this factor relevant to its system of limitations. *See Board of Regents v. Tomanio; Robertson v. Wegmann; Runyon v. McCrary; Johnson v. Railway Express.*

In New Mexico, the state legislature has enacted a statutory scheme of limitations which establishes limitations periods based on several factors, including the nature of the right violated, *compare* N.M. Stat. Ann. § 37-1-8 (three-year limitations period for personal injuries) *with* N.M. Stat. Ann. § 37-1-4 (four-year limitations period for property damage and for unwritten contracts); the underlying facts alleged, *compare* N.M. Stat. Ann. § 37-1-4 (four-year limitations period for unwritten contracts) *with* N.M. Stat. Ann. § 37-1-3 (six year limitations period for written contracts); and the identity of the party sued, *see, e.g.*, N.M. Stat. Ann. § 41-5-13 (1978) (three-year limitations period for malpractice claims against health care providers). Consistent with this scheme, section 15 imposes a specific limitations period on actions for torts filed against governmental entities or public employees. *DeVargas; Cozart v. Town of Bernalillo*, 99 N.M. 737, 663 P.2d 713 (Ct. App.

1983). Similarly, N.M. Stat. Ann. § 37-1-24 (1978) provides a specific limitations period for actions on contracts and similar claims brought against cities, towns, villages or officers thereof. Thus, since New Mexico law specifically requires that limitations periods be applied in part on the basis of the identity of the party sued, this factor must be taken into account when selecting a statute of limitations applicable to a § 1983 action filed in a federal courts sitting in New Mexico.

Under New Mexico law, the more specific statutes of limitations take precedence over and limit the application of general limitations periods. *See, e.g., Espanola Housing Authority v. Atencio.* The application of these specific limitations periods has been consistently upheld by New Mexico courts. *Espanola Housing Authority v. Atencio; Armijo v. Tandysh,* 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. denied,* 459 U.S. 1016 (1982); *see Aragon & McCoy v. Albuquerque National Bank,* 99 N.M. 420, 659 P.2d 306 (1983); *DeVargas.* Thus, in New Mexico, if an action for personal injuries is brought against a governmental entity or public employee, the specific applicability of section 15 would preclude the application of the more general provisions of § 37-1-8. Since New Mexico law recognizes distinctions based on classes of defendants in applying its own limitations periods, § 1988 requires that these distinctions be respected by a federal court.[15]

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[15] As is apparent from the discussion above, N.M. Stat. Ann. § 41-4-15 (1978) is not unique in considering, in part, the identity of the parties as a factor in establishing a limitations period. For example, N.M. Stat. Ann. § 41-5-13 (1978) provides a spe-

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The case of *Aitchison v. Raffiani* is on point. In that case, the Third Circuit held that a § 1983 claim filed in a federal court sitting in New Jersey was governed by the New Jersey statute of limitations applicable to actions filed against governmental entities. The court held that in selecting a state statute of limitations applicable to a § 1983 action, "[t]he essential nature of the federal claim, including the relief sought and the type of injury alleged should be examined 'within the scheme created by the various state statutes of limitations.'" 708 F.2d at 101. The Third Circuit found persuasive New Jersey cases which held that the specific limitations provisions of the New Jersey Tort Claims Act, rather than the more general limitations provisions of New Jersey law, applied to

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(Continued from previous page)

cific limitations period for malpractice actions against health care providers. In *Armijo v. Tandysh,* the New Mexico Court of Appeals addressed whether this specific limitation for a single class of defendants was valid. At issue was whether the time of accrual of an action under the Medical Malpractice Act discriminated against plaintiffs who sued health care providers. In *Armijo,* the plaintiff, as personal representative, sought damages for medical malpractice resulting in death. Under the state Wrongful Death Act, N.M. Stat. Ann. §§ 41-2-1 to -4 (1978), the claim would not have accrued until the time of death and would not have been time-barred, but under the Medical Malpractice Act, the claim accrued at the time the malpractice occurred, N.M. Stat. Ann. § 41-5-13 (1978), and was time-barred. The court of appeals ruled that the specific provisions of the Medical Malpractice Act controlled, and that the distinction between wrongful death claims filed against health care providers and wrongful death claims filed against others was not violative of equal protection or due process. Other New Mexico statutes which are based in part upon the identity of the parties include N.M. Stat. Ann. § 37-1-8 (limitations of actions against sureties); N.M. Stat. Ann. §§ 41-2-3 and -4 (wrongful death action to be brought by personal representatives except that a wrongful death action may be brought by the spouse, or other close relatives if death was caused by a railroad, stage coach or other public conveyance).

actions involving governmental entities. Based on these cases, the court ruled that the two-year limitations period set forth in the Act would have applied to the case had it been brought in state court and thus should be applied to the action filed in federal court.

The court in *Aitchison* found that it was "not unreasonable for a state to assume that the public interest in the repose of claims against a governmental agency is worthy of special consideration," and noted that "the problem of preserving evidence may be more difficult when the defendant is an elected body whose members serve for relatively short terms." 708 F.2d at 103. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. at 271 ("we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large"). The *Aitchison* court, therefore, noting "the Supreme Court's admonition in *Tomanio* that we consider state statutes that are borrowed for limitations purposes as 'binding rules of law,'" concluded that "different [state] statutes of limitations for actions against public and private entities *must be respected* [in a § 1983 action filed in federal court] if the periods are otherwise proper." 708 F.2d at 103 (emphasis added). *See also Foster v. Armontrout*, 729 F.2d at 585 (applying limitations period applicable to actions "against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office"); *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982) (applying limitations period applicable to actions against a share for other public officer); *Kosikowski v. Bourne* (applying limitations period applicable to actions against public bodies, officers, employees and agents); *Green v. Ten Eyck*, 572 F.2d 1233 (8th Cir. 1978) (applying limitations period set forth above in reference to *Foster*); *cf. Stewart v. City of Northport*, 425 So. 2d 1119 (Ala. 1983)

(Alabama statute of limitations applicable to actions against municipalities govern § 1983 action brought against an Alabama city).

There is nothing anomalous in deferring to a state's recognition of distinctions based on the identity of parties to an action. In *Robertson v. Wegmann,* for instance, this Court held that Louisiana survivorship law was applicable to a § 1983 claim. Louisiana recognizes survival of actions only if the decedent is survived by a spouse, child, parent or sibling. Even though application of Louisiana survivorship law resulted in abatement of the § 1983 action in *Robertson,* the Court upheld the state rule. "[G]iven that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not adversely affect § 1983's role in preventing official illegality. . . ." 436 U.S. at 592. In the instant case, as in *Robertson,* recognition of the distinctions made by the state would not frustrate the purposes of § 1983. A plaintiff with a valid claim will be compensated if he brings his action within two years; thus, a "state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him." *Id.*

By ignoring the factors considered relevant by the state in enacting its various statutes of limitations, the decision of the court below fails to reflect any legislative consideration of the policies supporting different periods of repose for different claims. The resulting unreasoned adoption of limitations periods for § 1983 claims violates the spirit and the letter of § 1988's mandate to apply state law. The court below elevated the goal of uniformity above the clear direction of Congress to apply state law.

Had the court analogized this § 1983 action to a state cause of action within the context of New Mexico's scheme of limitations, it would have reached the same conclusion reached by the state courts: that section 12 provides the state cause of action most analogous to the plaintiff's claims and that the two-year limitations period set forth in section 15 should apply to this action.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the judgment of the United States Court of Appeals for the Tenth Circuit be reversed with instructions that the complaint in this action be dismissed.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

DIANE FISHER
BEN M. ALLEN
JILL E. ADAMS
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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

(5)

No. 83-2146

In The

Supreme Court of the United States

October Term, 1984

RICHARD WILSON and MARTIN VIGIL, *Petitioners,*

v.

GARY GARCIA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JUNE 28, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

27pp

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UNITED STATES DISTRICT COURT

No. 82-0092 HB

GARY GARCIA, Plaintiff-Appellee

vs.

RICHARD WILSON and MARTIN VIGIL,
Defendant-Appellants

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2/ 5/82	5	DEFENDANT VIGIL'S MOTION to Dismiss for failure to state a claim upon which relief can be granted
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7/21/82	37	MEMORANDUM OPINION (HB) EOD: 7-22-82 cc: attorneys and all judges (sent for publication to the Bar Bulletin with Order also)

7/21/82	38	ORDER that Defendant's Motion to Dismiss be denied. The Court is further of the opinion that this matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order entered herein may materially advance the ultimate termination of the litigation. (HB) EOD: 7-22-82 cc: attorneys
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-1017

—o—

GARY GARCIA, Plaintiff-Appellee,

vs.

RICHARD WILSON, Defendant,

MARTIN VIGIL, Defendant-Appellant.

STATE OF NEW MEXICO,
Amicus Curiae.

—o—

DOCKET ENTRIES

Date	Proceedings
3/30/84	OPINION FILED. Published, signed opinion filed. En banc panel. Writing Judge is Seymour

4/ 9/84	OPINION REMARK. Correction to pages 2, 12 and 13 of opinion filed 3/30/84 (parties served by mail)
4/23/84	MANDATE ISSUED. Mandate issued to district court

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 83-1018

—o—

GARY GARCIA, Plaintiff-Appellee,

vs.

RICHARD WILSON, Defendant-Appellant,

MARTIN VIGIL, Defendant.

STATE OF NEW MEXICO,
Amicus Curiae.

—o—

DOCKET ENTRIES

Date	Proceedings
3/30/84	OPINION FILED. Published, signed opinion filed. En banc panel. Writing Judge is Seymour
4/ 9/84	OPINION REMARK. Correction to pages 2, 12, and 13 of opinion filed 3/30/84 (parties served by mail)
4/23/84	MANDATE ISSUED. Mandate issued to district court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

Civil No. 82-0092 HB

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually, and MARTIN VIGIL, individually,

Defendants.

COMPLAINT
(Filed January 28, 1982)

I. PRELIMINARY STATEMENT

This is a federal civil rights action brought by the Plaintiff against Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, Chief of the New Mexico State Police, in their individual capacities. Plaintiff seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and for the personal injuries he suffered which were caused by the acts and omissions of the Defendants acting under color of law. Plaintiff alleges that he was unlawfully and severely beaten and sprayed with teargas by Defendant Wilson. It is further alleged, inter alia, that prior to Defendant Wilson's employment as a New Mexico State Police Officer, Defendant Vigil knew, or should have known, of Defendant Wilson's propensity for unlawful behavior but he nevertheless allowed and caused Defendant Wilson to be hired as a New Mexico State Police Officer, and that while Defendant Wilson was a New Mexico State Police Officer, Defendant Vigil failed to properly and adequately discipline, train and control

Defendant Wilson. It is further alleged that acts and omissions of Defendant Vigil directly caused the injuries and violations of civil rights suffered by the Plaintiff.

II. JURISDICTION

1. The amount in controversy is in excess of $10,000.00, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1343(3)(4) and 42 U.S.C. § 1983, and the aforementioned Constitutional provisions.

III. PARTIES

2. PLAINTIFF GARY GARCIA is a resident of Rio Arriba County, State of New Mexico and was such a resident at all times material herein.

3. DEFENDANT RICHARD WILSON is a resident of Lea County, New Mexico and at all times relevant herein was a police officer employed by the New Mexico State Police, acting under color of state law and within the course of his employment. He is sued in his individual capacity.

4. DEFENDANT MARTIN VIGIL is a resident of Rio Arriba County, New Mexico and at all times relevant herein was the Chief of the New Mexico State Police employed by the New Mexico State Police, acting under color of state law and within the course of his employment. He is sued in his individual capacity.

IV. CAUSE OF ACTION

5. PLAINTIFF incorporates by reference herein the allegations contained in paragraphs one through four of this Complaint.

6. On or about April 27, 1979, PLAINTIFF GARY GARCIA, who was then a minor, was in the Village of Al-

calde, Rio Arriba County, New Mexico, and was unlawfully taken into custody by the New Mexico State Police.

7. DEFENDANT WILSON was given custody of PLAINTIFF and DEFENDANT WILSON, without justification, provocation, or probable cause, abused PLAINTIFF GARY GARCIA in violation of the clearly established Constitutional rights of the PLAINTIFF.

8. Thereafter, without provocation or justification, and in violation of the clearly established rights of the PLAINTIFF, DEFENDANT WILSON brutally and viciously beat PLAINTIFF about his face and body with a "slapper" and then DEFENDANT WILSON continued his unlawful and excessive assault and battery against PLAINTIFF by spraying the Plaintiff in the face with teargas. These acts of DEFENDANT WILSON caused the injuries suffered by the PLAINTIFF.

9. The incident of April 27, 1979, involving PLAINTIFF and DEFENDANT WILSON occurred just four days after DEFENDANT WILSON participated in a vicious assault against Merry Noel Sayas and Simona Maestas, residents of Rio Arriba County, New Mexico, and several months after he had violently abused another Rio Arriba County resident.

10. The incident of April 27, 1979, involving PLAINTIFF and DEFENDANT WILSON occurred just four days after DEFENDANT VIGIL was placed on notice of the violent propensities of DEFENDANT WILSON stemming from the Sayas incident, and DEFENDANT VIGIL knew, or should have known, about the violent propensities of DEFENDANT WILSON.

11. DEFENDANT VIGIL did not suspend, or take disciplinary, or any other action, against DEFENDANT WILSON after the Sayas incident to remove DEFEND-

ANT WILSON from citizen contacts where DEFENDANT WILSON could continue his known propensity to abuse citizens and violate their Constitutional rights.

12. Prior to his employment with the New Mexico State Police, DEFENDANT WILSON had been convicted of a variety of serious criminal offenses in several states, and this information was known or reasonably should have been known by DEFENDANT VIGIL prior to the incident between PLAINTIFF and DEFENDANT WILSON.

13. Prior to DEFENDANT WILSON'S employment with the New Mexico State Police, there were arrest warrants outstanding against DEFENDANT WILSON in the States of Minnesota and North Dakota, and these facts were known by DEFENDANT VIGIL, or should have been known by DEFENDANT VIGIL.

14. Prior to DEFENDANT WILSON'S employment with the New Mexico State Police, DEFENDANT VIGIL had received information that DEFENDANT WILSON had been fired for stealing from his employer, Shakey's Pizza, in Fargo, North Dakota.

15. Prior to DEFENDANT WILSON'S hiring by the New Mexico State Police, DEFENDANT VIGIL, Chief of the New Mexico State Police, had been advised by two high ranking New Mexico State Police Officers, who had investigated DEFENDANT WILSON'S employment application with the New Mexico State Police, that DEFENDANT VIGIL should not hire DEFENDANT WILSON as a New Mexico State Police Officer.

16. DEFENDANT VIGIL, acting in a negligent, grossly negligent and/or reckless manner, failed to perform an adequate background screening investigation on

DEFENDANT WILSON and/or failed to take adequate action after the background screening check on DEFENDANT WILSON was completed and allowed DEFENDANT WILSON to be hired as a New Mexico State Police Officer, and that said failures on the part of DEFENDANT VIGIL were direct cause of the injuries suffered by PLAINTIFF.

17. DEFENDANT VIGIL, acting in a negligent, grossly negligent, and/or reckless manner, failed to adequately train, supervise or discipline DEFENDANT WILSON, or otherwise control said defendant's known propensity for violence, and that said failures on the part of DEFENDANT VIGIL were the direct cause of the injuries suffered by PLAINTIFF.

18. The actions of the Defendants were part of a pattern, practice and course of conduct engaged in by said Defendants and other members of the New Mexico State Police, and constituted a deprivation of PLAINTIFF'S Constitutional rights, said rights being guaranteed to PLAINTIFF under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. § 1983.

19. Each of the individual Defendants, separately and in concert, acted under color of state law outside the scope of their jurisdiction and without authorization of law, and each of said Defendants acted willfully, knowingly and purposefully with the specific intent to deprive PLAINTIFF of his rights outlined in this Complaint.

20. Those Defendants who did not act intentionally, acted negligently, grossly negligently and in reckless disregard for PLAINTIFF'S rights as set out in this Complaint.

21. As a direct and proximate result of the aforesaid acts of Defendants, PLAINTIFF GARY GARCIA suffered and continues to suffer extreme physical pain and discomfort; extreme mental anguish; humiliation and embarrassment; medical expense; and violation of his civil rights.

WHEREFORE, PLAINTIFF prays for judgment against the Defendants, and each of them, jointly and severally, as follows:

1. Compensatory damages in a sum to be set by the jury;

2. Punitive damages, because of the nature of the acts of the Defendants, in the sum of $100,000.00;

3. For reasonable attorney fees and costs of suit incurred herein; and

4. For such other and further relief as the Court deems just and proper.

A JURY TRIAL IS DEMANDED.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P.O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CIV-82-0092 C

GARY GARCIA,
Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

COME NOW Richard Wilson and Martin E. Vigil, Defendants in the above-entitled cause, by and through their attorney John W. Cassell, Assistant Legal Advisor to the New Mexico State Police, and Special Assistant Attorney General for the State of New Mexico, pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, and Rule 9b and 9c, Rules of the United States District Court for the District of New Mexico, and hereby move this honorable Court as follows:

1. That the Court finds the applicable statue of limititations governing causes of action brought pursuant to 42 U.S.C. §1983 alleging the facts contained in Plaintiff's complaint is that provided in Section 41-4-15A, N.M.S.A., 1978.

2. That the Court dismiss the above-entitled cause on the grounds that it is barred by the applicable statute of limitations as untimely filed.

3. In the alternative, that the Court grant leave to these Defendants, pursuant to 28 U.S.C. §1292, to take an

interlocutory appeal on this issue to the United States Court of Appeals for the Tenth Circuit.

The grounds for this motion are fully explained in the brief in support attached hereto and made a part hereof.

It is affirmatively stated that opposing counsel was not contacted for concurrence as it was assumed that, in view of the subject matter of this motion, it could not be obtained.

WHEREFORE Defendants pray this honorable Court grant the relief requested herein or, in the alternative, the alternative relief requested herein, and such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JOHN W. CASSELL
Special Assistant Attorney General
Assistant Legal Advisor
New Mexico State Police
P. O. Box 1628
Santa Fe, New Mexico 87501
(505) 827-5141

I hereby certify that a
true and correct copy
of this document was
mailed to all counsel of
record on this _____day
of February, 1982.

/s/ JOHN W. CASSELL

IN THE UNITED STATES DISTRICT C[illegible]T
FOR THE DISTRICT OF NEW MEXIC[illegible]

CV No. 82-0092 C

GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

RESPONSE TO MOTION TO
DISMISS FILED BY DEFENDANT VIGIL
(Filed February 18, 1982)

The Plaintiff, by his counsel, responds to the Motion to Dismiss filed by Defendant Vigil, and moves this Court to deny the Motion to Dismiss on the grounds that it is not well taken.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P.O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

I hereby certify that I
mailed a copy of the above
Response to opposing counsel
of record, Ben Allen, Esq.
P. O. Box 1888, Albuquerque,
NM 87103, and Robert Cassell,
Esq., New Mexico State Police,
P. O. Box 1628, Santa Fe, NM
87501, this 18th day of
February, 1982, by first class
mail, postage prepaid.

/s/ STEVEN G. FARBER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV-82-0092 C
GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,
Defendants.

MOTION TO CALL NEW AUTHORITY
TO THE ATTENTION OF THE COURT

COMES NOW Martin E. Vigil, Defendant in the above-entitled cause, by and through his attorney, John W. Cassell, Assistant Legal Advisor to the New Mexico State Police and Special Assistant Attorney General of the State of New Mexico, and respectfully calls to the attention of this honorable Court the DECISION ON CERTIORARI filed by the New Mexico Supreme Court on February 22, 1982 in the case of *DeVargas v. State*, No. 13,965 (1982).

The case presents the question of which statute of limitations applies in New Mexico to causes of action brought pursuant to 42 U.S.C. §1983 for deprivation of constitutional rights alleged to be caused by law enforcement officers.

It is respectfully requested that this honorable Court consider this decision (copy attached) in ruling on Defendant Martin E. Vigil's MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED now pending before the Court in the above-captioned matter. It is further requested that the attached copy of this new authority be considered in lieu of a memorandum of points and authorities as required by Rule 9, Rules of the United States District Court for the District of New Mexico.

If is affirmatively stated, pursuant to Rule 9b, Rules of the United States District Court for the District of New Mexico, that opposing counsel was not contacted as it is believed, in view of the nature of this authority, that he would not concur.

THEREFORE, Defendant Martin E. Vigil prays that the relief requested herein be granted, and such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

/s/ JOHN W. CASSELL
Special Assistant Attorney General
Assistant Legal Advisor
New Mexico State Police
P. O. Box 1628
Santa Fe, New Mexico 87501
(505) 827-5141

I hereby certify that a true
and correct copy of this
document and the attached
DECISION ON CERTIORARI
was mailed to all counsel of
record on this 24th day of
February, 1982.

/s/ JOHN W. CASSELL

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

NO. 13,965

ANTONIO "IKE" DeVARGAS,
Plaintiff-Petitioner,

vs.

STATE OF NEW MEXICO, ex rel.
NEW MEXICO DEPARTMENT OF
CORRECTIONS, CLYDE O. MALLEY,
EDWIN T. MAHR, MICHAEL HANRAHAN,
JOHN DOES 1 through 10,
Defendants-Respondents.

DECISION ON CERTIORARI

(Filed February 22, 1982)

FEDERICI, Justice.

The opinion of the Court of Appeals was filed on October 1, 1981. A petition for writ of certiorari was filed in this Court on November 9, 1981. Thereafter, the petition for writ of certiorari was granted on November 20, 1981.

After an exhaustive review of the transcripts, briefs and authorities, it is the decision of this Court that the petition for writ of certiorari heretofore granted be quashed as improvidently issued.

Under Section 42 U.S.C. § 1983, the statute of limitations applicable is that which applies to the most closely analogous cause of action under state law.

In *Board of Regents v. Tomanio,* 446 U.S. 478 (1980), the Supreme Court of the United States clearly stated that lower federal courts must look to and apply the state statute of limitations governing the state cause of action provided by state law which is most closely analogous to

Section 42 U.S.C. § 1983 and which is not inconsistent with the Constitution and Laws of the United States.

Under New Mexico law, the most closely analogous state cause of action is provided for by the New Mexico Tort Claims Act under Section 41-4-12, N.M.S.A. 1978. The statute of limitations applicable to a cause of action under Section 41-4-12 is set forth in Section 41-4-15, N.M.S.A. 1978. Under Section 41-4-15, the action must be commenced within two years after the occurrence which results in the injury.

The original complaint failed to state a claim upon which relief could be granted. *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979). The amendment to the complaint which was filed after the two-year statute of limititations had run did not relate back to the original filing since the original complaint did not state a cause of action. N.M.R. Civ. P. 15(c), N.M.S.A. 1978

IT IS SO ORDERED.

/s/ WILLIAM R. FEDERICI, Justice

WE CONCUR:

/s/ MACK EASLEY, Chief Justice
/s/ H. VERN PAYNE, Justice
/s/ WILLIAM RIORDAN, Justice
/s/ DAN SOSA, JR., Senior Justice, not participating.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA, Plaintiff,

vs.

RICHARD WILSON, Individually,
and MARTIN VIGIL, Individually,
Defendants.

MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED
(Filed February 26, 1982)

Defendant Richard Wilson, by and through his attorneys Rodey, Dickason, Sloan, Akin & Robb, P.A., moves the Court for an Order dismissing Plaintiff's Complaint. As grounds for the Motion, Defendant states:

1. That the applicable Statute of Limititations governing causes of action brought pursuant to 42 USC §1983, as alleged in Plaintiff's Complaint, is the two year Statute of Limitations provided in §41-4-15A N.M.S.A. 1978.

2. That the above-styled cause was not filed within the two year limitation stated above.

3. That should this Court determine that the instant action is governed by a three Statute of Limitations, that this Court should grant leave to this Defendant, pursuant to 28 USC §1292, to take an interlocutory appeal on the issue to the United States Court of Appeals for the Tenth Circuit.

4. The grounds for this Motion are more fully stated in the Brief in Support attached hereto and made a part hereof.

Due to the nature of the Motion and since granting the Motion would result in dismissal of the action, concurrence of opposing counsel has not been sought.

WHEREFORE, Defendant requests the Court to enter an Order dismissing Plaintiff's Complaint and cause of action or, in the alternative, granting Defendant leave to take an interlocutory appeal on the issues presented herein to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,
RODEY, DICKASON, SLOAN,
AKIN & ROBB, P.A.

By /s/ BEN M. ALLEN
Attorneys for Defendants
P. O. Box 1888
Albuquerque, New Mexico 87103
505/765-5900

I hereby certify that I have mailed a copy of the foregoing to opposing counsel of record this 25th day of February, 1982.

/s/ BEN M. ALLEN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA,
Plaintiff,

vs.

RICHARD WILSON, individually, and
MARTIN VIGIL, individually,
Defendants.

REPLY TO MOTION TO CALL NEW AUTHORITY TO THE ATTENTION OF THE COURT

The Plaintiff, by his counsel, responds to the Motion to Call New Authority to the Attention of the Court as follows:

1. The decision of the New Mexico Supreme Court in *Antonio "Ike" Devargas v. State of New Mexico, et al.*, Supreme Court No. 13,965 is called a *Decision on Certiorari* and is not authority or precedent.

2. A Decision on Certiorari is not a formal opinion of the Supreme Court of New Mexico and is not published. Rule 7, Supreme Court Miscellaneous Rules, Judicial Pamphlet No. 9, 1980 Cum.Supp.

3. Rule 7 reads as follows:

Rule 7. Opinions in civil cases.

(a) In civil cases it is unnecessary for the court to write formal opinions in every case. Disposition by order or memorandum opinion does not mean that the case is considered unimportant. It does mean that no new points of law, making the decision of value as a precedent, are involved.

(b) When the court determines that one or more of the following circumstances exists and is dispositive of the case, it may dispose of the case by order or memorandum opinion: (1) the issues presented have been previously decided by the supreme court or court of appeals; (2) the presence or absence of substantial evidence disposes of the issue; (3) the issues are answered by statute or rules of court; (4) the asserted error is not prejudicial to the complaining party; (5) the issues presented are manifestly without merit.

(c) All formal opinions shall be published. An order or memorandum opinion, because it is unreported and not uniformly available to all parties, shall not be cited as precedent. [Adopted, effective April 26, 1979.]

4. As can be seen from the Affidavit of Rose Marie Alderete, Clerk of the New Mexico Supreme Court, the Decision on Certiorari, filed on February 22, 1982, in *Devargas v. State,* supra, is not a formal opinion of the Supreme Court and will be neither published nor reported. A copy of the Affidavit of Rose Marie Alderete is attached hereto, marked Exhibit "A", and incorporated herein by reference.

5. Pursuant to Miscellaneous Rule 7(c), the Decision on Certiorari in *Devargas v. State,* supra, because it "is unreported and not uniformly available to all parties, shall not be cited as precedent."

6. The only reported New Mexico decision that discusses the statute of limitations question presented by this case is the decision of the New Mexico Court of Appeals in *DeVargas v. State,* — N.M. —, Ct. App. No. 5062 (1981), which specifically does not address the appropriate statute of limitations.

7. As stated previously, the only reported precedent for the appropriate statute of limitations is *Hansbury v. Regents of the University of California,* 596 F.2d 944 (10th Cir., 1979) and *Gunther v. Miller,* 498 F.Supp. 882 (D. N.M., 1980).

Respectfully submitted,

/s/ STEVEN G. FARBER

208 Griffin Street
P. O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF

I hereby certify that
I mailed a copy of the
above Reply to opposing
counsel of record, this
4th day of March, 1982,
by first class mail, postage prepaid.

/s/ STEVEN G. FARBER

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092 C

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants.

AFFIDAVIT OF ROSE MARIE ALDERETE

ROSE MARIE ALDERETE, being duly sworn, does hereby depose and state that:

1. I am the Clerk of the Supreme Court of New Mexico;

2. The Decision on Certiorari filed on February 22, 1982 in the case of *DeVargas v. State of New Mexico*, et al., Supreme Court No. 13,965 is not a formal opinion of the Supreme Court of New Mexico and will not be reported or published.

/s/ ROSE MARIE ALDERETE

SEAL:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. CIV 82-0092(C)

GARY GARCIA,

Plaintiff,

vs.

RICHARD WILSON, individually,
and MARTIN VIGIL, individually,

Defendants,

RESPONSE TO MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED FILED BY DEFENDANT WILSON

The Plaintiff, by his counsel, moves this Court to deny the Motion on the grounds that it is not well taken:

1. The grounds for this response are identical to those stated in a similar Response to the Motion to Dismiss filed by Defendant Vigil.

2. In order to prevent needless repetition of arguments already stated on behalf of Plaintiff, the Plaintiff hereby incorporates the arguments stated in all Briefs filed herein on behalf of the Plaintiff.

Respectfully submitted,

/s/ STEVEN G. FARBER
208 Griffin Street
P. O. Box 2473
Santa Fe, New Mexico 87501
505/988-9725

ATTORNEY FOR PLAINTIFF,
GARY GARCIA

I hereby certify that I mailed a copy of the above Response to opposing counsel of record, this 4th day of March, 1982, by first class mail, postage prepaid.

/s/ STEVEN G. FARBER

RESPONDENT'S

BRIEF

Office - Supreme Court, U.S.
FILED
DEC 11 1984
ALEXANDER L. STEVAS
CLERK

No. 83-2146

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RICHARD WILSON and MARTIN VIGIL,
Petitioners,

v.

GARY GARCIA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to the statutory provisions reproduced in Appendix C to the Petition for Writ of Certiorari (Pet. Cert. App. 46-48), and in Appendix A to the Brief in Opposition (Brief Op. 1-4), the following statutory provisions are relevant to the consideration of this matter: Section 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27; Section 1 of the Civil Rights Act of April 20, 1871, C. 22, 17 Stat. 13; and Section 722 of the Revised Statutes. These Provisions are reproduced in Appendix A to this Brief.

STATEMENT OF THE CASE

The Respondent, Gary Garcia (hereinafter "Plaintiff"), filed a lawsuit, in the United States District Court for the District of New Mexico, under 42 U.S.C. § 1983 against Petitioners Richard Wilson, former New Mexico State Police Officer, and Martin Vigil, former Chief of the New Mexico State Police (hereinafter "Defendants"), in their individual capacities. Plaintiff seeks money damages to compensate him for the deprivation of his civil rights guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, and for the severe personal injuries he suffered as a result of the acts and omissions of the Defendants acting under color of law (J.A. 4-9). The Complaint specifically alleges that Defendant Wilson unlawfully and "brutally and viciously" beat Plaintiff with a "slapper," and thereafter sprayed tear gas in Plaintiff's face (J.A. 4-6). The Complaint also alleges that Defendant Vigil improperly allowed Defendant Wilson to be hired as a New Mexico State Police Officer because, prior to his employment with the New Mexico State Police, Defendant Wilson had been convicted of a variety of serious criminal offenses in several states, and there were arrest warrants outstanding against Defendant Wilson in the states of Minnesota and North Dakota and that these facts were known by, or should have been known by, Defendant Vigil (J.A. 6-8). The Complaint further alleges that, prior to Defendant Wilson's

employment with the New Mexico State Police, Defendant Vigil had received information that Defendant Wilson had been fired for stealing from a former employer, and that Defendant Vigil had been advised by two high-ranking New Mexico State Police Officers, who had investigated Defendant Wilson's employment application with the New Mexico State Police, that Defendant Vigil should not hire Defendant Wilson as a New Mexico State Police Officer (J.A. 7-8). The Complaint alleges that the conduct of Defendant Vigil, in allowing Defendant Wilson to be hired as a New Mexico State Police Officer, directly caused the injuries and violations of the civil rights suffered by the Plaintiff (J.A. 8-9).

The Complaint also alleges that Defendant Vigil failed to properly and adequately discipline, train and control Defendant Wilson, thereby directly causing the injuries and violations of civil rights suffered by the Plaintiff (J.A. 7-8).

The incident in question in this case took place on April 27, 1979 (J.A. 5). In the Complaint it is alleged that the incident of April 27, 1979, involving Plaintiff and Defendant Wilson, occurred just four days after Defendant Wilson viciously assaulted two women, and several months after Defendant Wilson had physically abused another citizen, and that Defendant Vigil was placed on notice of the violent propensities of Defendant Wilson (J.A. 6). The Complaint further alleges that Defendant Vigil did not suspend, or take disciplinary, or any other action, against Defendant Wilson (J.A. 6-7).

This lawsuit was timely filed on January 28, 1982 (J.A. 4), pursuant to *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980) and *Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979). The Defendants filed a Motion to Dismiss claiming that the statute of limitations contained in the New Mexico Tort Claims Act, N.M.Stat.Ann., § 41-4-15(A) (1978) (hereinafter "NMTCA") barred the filing of Plaintiff's Complaint (J.A. 10, 17).

Approximately one month after the filing of the Complaint, the New Mexico Supreme Court entered its decision quashing

certiorari in *DeVargas* v. *State of New Mexico*, 97 N.M. 563, 642 P.2d 166 (1982) (J.A. 15) and, without analysis or characterization of the claim, erroneously stated that the NMTCA two-year statute of limitations should apply to § 1983 actions (J.A. 16). On July 21, 1982, the Honorable Howard Bratton, Chief Judge, filed his Opinion and Order denying the Motions to Dismiss and holding that a § 1983 action is an action based on a statute and that the appropriate New Mexico statute of limitations for § 1983 actions was the four-year general statute of limitations contained in N.M.Stat.Ann. § 37-1-4 (1978). *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980) (Pet. Cert. App. 43-44). Chief Judge Bratton then entered his Order certifying an immediate interlocutory appeal on the statute of limitations issue to the United States Court of Appeals for the Tenth Circuit, pursuant to 28 U.S.C. § 1292(b) (Pet. Cert. App. 45). On January 6, 1983, the Tenth Circuit granted Defendants permission to appeal from Chief Judge Bratton's Order on the statute of limitations issue (J.A. 2).

The cause was argued and submitted to a three-judge panel on March 7, 1983. The submission Order was vacated on May 23, 1983, and on the Court's own motion, the appeal was submitted to the full Court for an *en banc* determination. Thereafter, the Tenth Circuit posed a series of questions to counsel in a number of pending cases from the several states within the Circuit seeking supplemental briefs regarding the criteria for selection of the appropriate state statute of limitations to be applied to cases brought under 42 U.S.C. § 1983 (*See* footnote 12, *infra*). Oral argument was held before the Court *en banc* on October 11, 1983.

On March 30, 1984, the Tenth Circuit, sitting *en banc*, issued its Opinion and Order of Judgment. *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) (J.A. 2-3). In its Opinion, the Court determined that, in the Tenth Circuit, henceforth, all § 1983 claims will be uniformly characterized for statute of limitations purposes as "an action for injury to personal rights" rather than in terms of the specific facts generating a particular suit (Pet. Cert. App. 25-26). 731 F.2d 640, 651 (10th Cir. 1984). The

Court then decided that the most appropriate New Mexico limitations period to be applied to the Plaintiff's § 1983 action is that found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." (Pet. Cert. App. 26-27). 731 F.2d at 651. The Court determined that the Complaint in this case was timely filed. A Petition for Writ of Certiorari was filed on June 28, 1984. This Court granted Certiorari on October 1, 1984.

SUMMARY OF THE ARGUMENT

I. The application of the New Mexico Tort Claims Act (NMTCA) limitations period, N.M. Stat.Ann. § 41-4-15 (1978), to § 1983 actions is inconsistent with the Constitution and laws of the United States. The Tenth Circuit properly ruled that § 1983 actions are best characterized as actions for injuries to personal rights. The characterization of § 1983 actions for the vindication of federal rights is a matter of federal law. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966). Federal law provides no limitations period for actions brought under 42 U.S.C. § 1983. The law requires that once the essential nature of the federal claim has been characterized as a matter of federal law, then the most appropriate, or analogous, state limitations period be applied to the federal claim based upon the federal characterization. 42 U.S.C. § 1988; *Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980).

The Tenth Circuit determined that the most analogous cause of action, or appropriate New Mexico limitations period to be applied to § 1983 actions, is found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." Since the Complaint in this case was filed within three years, the Tenth Circuit held that the Complaint was timely filed.

Inconsistency, confusion and chaos have developed in the federal Courts because of the attempts by the Courts to frag-

ment the single cause of action created by Congress in accordance with analogies drawn to rights created by state law. The legislative history of the Reconstruction-era Civil Rights Acts confirms the propriety of uniformly characterizing all § 1983 claims as "injuries to personal rights" for state limitation period classification, because civil rights were perceived, during the debates, as being ". . . natural rights of man" and ". . . the great fundamental rights which belong to all men." This approach to the characterization of a § 1983 action will not lead to nationwide uniformity. *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

> Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state depending upon state law. *Within* each state, however, the most appropriate statute of limitations will be applied to all § 1983 claims brought within that state.
>
> *Garcia* v. *Wilson*, 731 F.2d 640, 651 n.4 (10th Cir. 1984)

The adoption of this characterization method promotes state policies of settled expectations and repose, and discourages all this voluminous litigation on statute of limitations issues that is collateral to the merits and which consumes scarce judicial resources.

II. The New Mexico Tort Claims Act (NMTCA) is not the most appropriate or closely analogous New Mexico cause of action to a § 1983 action. The NMTCA does not create the identical cause of action as § 1983, nor does the NMTCA expressly refer to § 1983 actions. The structure of the NMTCA frustrates the remedial and deterrent purposes of a § 1983 Action. In New Mexico, the Legislature distinguishes a tort from a Constitutional violation. *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982). The DeVargas decision relied upon by the Defendants is totally inconsistent with *Wells* v. *County of Valencia*, *supra*. The NMTCA limitations period, N.M.Stat.Ann. § 41-4-15 (1978), which is unambiguous and which refers exclusively to torts, should not be applied to

§ 1983 actions, for no intent to include § 1983 actions within the meaning of the term "tort" in the NMTCA can be fairly read into the NMTCA limitations provision as it now stands. The *DeVargas* decision, applying the NMTCA limitations provision, discriminates against the federal cause of action and creates arbitrary results that are inconsistant with the Constitution and laws of the United States. The judgment of the Court below should be affirmed. An acceptance of the Defendants' position will continue to lead to needless collateral litigation on these limitations issues caused by the confusion and inconsistency which result from reference to state law analogies.

III. If this Court should, nevertheless, determine that the NMTCA limitations period applies to § 1983 actions, then any such ruling should be applied prospectively so as to not bar the action of the Plaintiff because the Plaintiff relied on federal precedent in filing this action. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

ARGUMENT

I. The Court Of Apppeals Properly Characterized 42 U.S.C. § 1983 Actions As Actions For Injuries To Personal Rights And Applied The New Mexico Personal Injury Statute Of Limitations To This Case And Found That This Action Was Timely Filed.

The Civil Rights Act of 1871, codified in part in 42 U.S.C. § 1983 (1976)[1] does not contain a statute of limitations. In

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[1] Section 1983 provides in pertinent part:

§ 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Burnett v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), this Court set forth the process that federal Courts utilize in determining the rule of decision to be applied to actions brought under the Reconstruction-era Civil Rights Acts when the statutes do not contain an applicable rule. This Court noted that Congress has directed federal Courts to look to state law in civil rights cases when federal law is deficient and the state law "is not inconsistent with the Constitution and laws of the United States." *See* 42 U.S.C. § 1988 (1976).[2] *Burnett* v. *Grattan* described a three-step process which Congress has directed federal Courts to follow when necessary to borrow an appropriate rule from state law.

> First, courts are to look to the laws of the United States 'so far as such laws are suitable to carry [the civil and criminal civil rights statutes] [42 U.S.C. § 1988] into effect.'. . . If no suitable federal rule exists, courts undertake the second step by considering application of state 'common law, as modified and changed by the constitution and statutes' of the forum state. Ibid. A third step asserts the predominance of the federal interest; courts are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.' Ibid.

___ U.S. at ___, 104 S.Ct. at 2928-29, 82 L.Ed.2d at 43-44.

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[2] Section 1988 provides in pertinent part:

§ 1988. Proceedings in vindication of civil rights; . . . .

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' and of Title 'CRIMES,' for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . ."

In this case, the Tenth Circuit *(en banc)* applied the directions of Congress and this Court to determine "the state law of limitations governing an analogous cause of action." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 483-484, 100 S.Ct. 1790, 1794-95, 64 L.Ed.2d 440 (1980); to " 'adopt the local law of limitation,' " *Runyon* v. *McCrary*, 427 U.S. 160, 180, 96 S.Ct. 2586, 2599, 49 L.Ed.2d 415 (1976); and to apply "the most appropriate one provided by state law." *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295 (1975).[3] First, the Court of Appeals characterized the essential nature of this federal action "as being an action for injury to personal rights,"[4] recognizing that the characterization of this federal claim is a matter of federal law. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Pauk* v. *Board of Trustees*, 654 F.2d 856, 865-66 and n.6 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Zuniga* v. *Amfac Foods, Inc.*, 580 F.2d 380, 383 (10th Cir. 1978); *Williams* v. *Walsh*, 558 F.2d 667, 672 (2d Cir. 1977). Next, the Court of Appeals looked to New Mexico law and determined that the appropriate limitations period for injuries to personal rights in New Mexico is that found in N.M.Stat.Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for an injury to the person or reputation of any person, within three years." The Complaint in this case having been filed within three years from the date of the injury, the Court found that the Plaintiff's suit was timely filed. 731 F.2d at 651.

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[3] Although the opinion of the Court below in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) *(en banc)* preceded this Court's opinion in *Burnett* v. *Grattan*, ___ U.S. ___, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), from the following analysis it can be clearly seen that the process the Tenth Circuit *(en banc)* followed substantially mirrors the borrowing process specified in *Burnett* v. *Grattan*.

[4] *Garcia* v. *Wilson*, 731 F.2d at 650-51.

A. The Characterization Of A § 1983 Action Is A Matter Of Federal Law, And Based Upon The Federal Characterization Of The Essential Nature Of This Federal Claim, The Court Of Appeals Looked To The Law Of New Mexico And Selected The Most Appropriate And Analogous New Mexico Limitations Period, And Determined That This § 1983 Action Was Timely Filed.

The Court's characterization of § 1983 civil rights actions as being in essence "actions for injury to personal rights" is correct, and is supported by the legislative history of the Reconstruction-era Civil Rights Acts, and the prior decisions of this Court. *See infra*, Point I-C. The federal characterization process engaged in by the Court of Appeals follows the first step of the *Burnett* v. *Grattan* analysis, which is "to look to the laws of the United States so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect." ___ U.S. at ___, 104 S.Ct. at 2928-29, 82 L.Ed.2d at 43-44. The laws of the United States contain the substantive content for this characterization process.

The second step of the *Burnett* v. *Grattan* analysis comes into play after the essential nature of the federal action has been characterized according to federal law. Since § 1983 does not contain a limitations period, it is at that point the federal Court, based upon the Court's characterization of the federal claim as a matter of federal law, turns to state law to borrow the appropriate state limitations period to be applied to actions brought under § 1983. *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 706, 86 S.Ct. 1107, 1113, 16 L.Ed.2d 192 (1966); *Garcia* v. *Wilson*, 731 F.2d 640, 642 (10th Cir. 1984); *Knoll* v. *Springfield Township School District*, 699 F.2d 137, 140 (3d Cir. 1983); *Braden* v. *Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981); *Burns* v. *Sullivan*, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980). As the Court of Appeals noted, "[a]lthough the federal courts are bound by the state's construction of its own statute of limitations, it is a question of federal law whether a particular statute, as construed by the state, is applicable to a

federal claim." *Garcia* v. *Wilson*, 731 F.2d at 642-643; *Pauk* v. *Board of Trustees*, 654 F.2d at 866, n.6 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982). Federal Courts have historically engaged in the process of characterizing a federally-created claim as a matter of federal law to determine the nature of the claim and then applying the appropriate state limitations period based upon the federal characterization of the claim.[5]

Since no federal limitations rule exists for § 1983 actions, *O'Sullivan* v. *Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914), the Court of Appeals properly undertook the second

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[5] *See McNutt* v. *Duke Precision Dental & Orthodontic Lab.*, 698 F.2d 676, 679 (4th Cir. 1983); *Clark* v. *Musick*, 623 F.2d 89, 91 (9th Cir. 1980) *(per curiam); Van Horn* v. *Lukhard*, 392 F.Supp. 384, 388-391 (E.D. Vir. 1975); *Smith* v. *Cremins*, 308 F.2d 187, 189 (9th Cir. 1962) (civil rights action) ("In determining which period of limitations to apply to an action under a particular federal statute, the federal court accepts the state's interpretations of its own statute of limitations (footnote omitted), but determines for itself the nature of the right conferred by the federal statute." (footnote omitted)); *Moviecolor Limited* v. *Eastman Kodak Company*, 288 F.2d 80, 83 (2d Cir. 1961) (anti-trust action) ("Thus, when a state has established different periods of limitations for different types of actions, a federal Court enforcing a federally created claim looks first to federal law to determine the nature of the claim and then to state court interpretations of the statutory catalogue to see where the claim fits into the state scheme") citing *McClaine* v. *Rankin*, 197 U.S. 154, 25 S.Ct. 410, 49 L.Ed. 702 (1905); *McClaine* v. *Rankin, supra* (National Bank Act Assessment action) (the Court characterized the federal action as being "enforceable only according to the federal statute" and therefore looked to the appropriate state limitations period for a limitations period covering a liabilty based upon statute and finding none, the Court applied the state residuary limitations period). 197 U.S. at 162-63, 25 S.Ct. at 412-13. *See also Chattanooga Foundry and Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906), *affirming City of Atlanta* v. *Chattanooga Foundry and Pipe Works*, 127 Fed.Rep. 23, 32 (6th Cir. 1903) (antitrust action characterized by the federal Court as "action on a statute liability," state residuary limitations period applied).

and third steps [of the *Burnett* v. *Grattan* process] "by considering application of State common law, as modified and changed by the constitution and statutes of the forum state," and asserting the predominance of the federal interest in determining the limitations period to be applied in this case. *Burnett* v. *Grattan*, ____ U.S. at ____, 104 S.Ct. at 2929, 82 L.Ed.2d at 43. The Tenth Circuit was obviously mindful of the admonition that ". . . [t]he cases also establish that the silence of Congress is not to be read as automatically putting an imprimatur on state law. Rather, state law is applied only because it supplements and fulfills federal policy, and the ultimate question is what federal policy requires. [Citations omitted.] *UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 709, 86 S.Ct. 1107, 1115, 16 L.Ed.2d 192 (1966) (White, J., dissenting). Federal policy requires that the essential nature of a federal civil rights action be characterized as a matter of federal law.

The Tenth Circuit noted that the elements of a § 1983 claim are the deprivation of rights secured by the Constitution and federal law, and action occurring under color of state law, that these rights have been described as inhering "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eyes of the law,"[6] that "[I]n the broad sense, every cause of action under § 1983 which is well-founded results from personal injuries,"[7] and that "[T]he cause of action is in essence delictual."[8] The Tenth Circuit concluded that every § 1983 claim is in essence an action for injury to personal rights. 731 F.2d at 650. The Tenth Circuit then looked to the law of the forum state—New Mexico—and, based upon the federal characterization of the claim, determined that the appropriate New Mexico limitations period for injuries to person-

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[6] *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945, 946 (1st Cir. 1978) quoting *Commerce Oil Refining Corp.* v. *Miner*, 98 R.I. 14, 199 A.2d 606 (1964).

[7] *Almond* v. *Kent*, 459 F.2d 200, 204 (4th Cir. 1972).

[8] *Braden* v. *Texas A & M University System*, 636 F.2d 90, 92 (5th Cir. 1981).

al rights, for borrowing purposes, is that found in N.M.Stat. Ann. § 37-1-8 (1978), which provides that "[a]ctions must be brought . . . for injuries to the person or reputation of any person within three years." (Pet. Cert. App. 26-27.) 731 F.2d at 651.

The Court of Appeals thus correctly decided that the Plaintiff's lawsuit was timely filed. *Garcia* v. *Wilson*, 731 F.2d 640, 651 (10th Cir. 1984) *(en banc)*. In applying the New Mexico personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978), and not the New Mexico Tort Claims Act limitation period, N.M.Stat.Ann. § 41-4-15 (1978) urged by the Defendants, the Court of Appeals implicitly recognized that "[T]o the extent that particular state concerns are inconsistent with, or of marginal relevance to, the policies informing the Civil Rights Acts, the resulting state statute of limitations may be inappropriate for civil rights claims." *See Burnett* v. *Grattan*, ___ U.S. at ___, and n.15, 104 S.Ct. at 2931, and n.15, 82 L.Ed.2d at 46, and n.15. *See infra* at Point II.

B. The Court Of Appeals' Decision To Uniformly Characterize All § 1983 Actions As Being Actions For Injuries To Personal Rights Is Correct And Essential Because The Approach Urged By The Defendants Has Caused Inconsistency, Confusion, And Needless Collateral Litigation In The Federal Courts.

The Tenth Circuit, in characterizing the civil rights claims in this case as being "in essence an action for injury to personal rights," 731 F.2d at 650, also decided that "[H]enceforth, all § 1983 claims in the Tenth Circuit will be uniformly so characterized for statute of limitations purposes." This uniform characterization approach within the Circuit is essential because of the incredible difficulty, inconsistency, and confusion that has evolved in the determination of selecting "appropriate" or "closely analogous" state statutes of limitations to be applied to civil rights actions. These problems are primarily caused by the underlying conduct analysis advocated by the Defendants. The Court of Appeals has rejected this approach

as unreasonable and unworkable. 731 F.2d at 648-651.[9] The Court of Appeals noted that its decision to uniformly characterize the nature of the federal civil rights claim was not inconsistent with this Court's concern regarding imposing nationwide uniformity in the selection of limitations periods for § 1983 actions in the absence of Congressional action. The Tenth Circuit recognized that ". . . reliance on state law obviously means that there will not be nationwide uniformity on these issues." *Board of Regents* v. *Tomanio*, 446 U.S. at 489, 100 S.Ct. at 1797, (quoting *Robertson* v. *Wegmann*, 436 U.S. 584, 594 n.11, 98 S.Ct. 1991, 1997 n.11, 56 L.Ed.2d 554 (1978)), but added that:

> We do not read this statement as contrary to our determination that uniformity in the characterization of federal civil rights claims is a commendable goal. Uniformity of characterization will not result in one limitations period being applied to all civil rights cases regardless of the state in which they arose. Rather, the limitations statutes in each state will be reviewed to determine which particular state statute is most applicable to actions for injuries to personal rights. The resulting period of limitations will thus vary from state to state, depending on state law. *Within* each state, however, the most appropri-

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[9] Practically every commentator who has studied the problem has criticized the lack of unity of the Courts in finding a consistent method for borrowing state statutes of limitations in federal civil rights actions and, in particular, the analytical approach advanced by the Defendants. These articles include collections of the hundreds of conflicting opinions on this issue. *See e.g.*, 2 *Civil Rights Actions* 4-1, *et seq.*, Cook and Sobieski (1984); Jarmie, *Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit's Resolution*, 15 N.M.L.Rev. ___ (1984); Note, *A Call for Uniformity: Statutes of Limitations in Federal Civil Rights Actions*, 26 Wayne L.Rev. 61 (1979); Comment, *Statutory Time Limitations on Back Pay Recovery in Section 1981 and 1983 Employment Discrimination Suits*, 29 Emory L.J. 437, 445 (1980); Comment, *Statutes of Limitations in Federal Civil Rights Litigation*, 1976 Ariz. St.L.J. 97; Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 Columbia L.Rev. 763 (1968).

> ate statute of limitations will be applied to all § 1983 claims brought within that state. Other circuits have agreed with us that the interest in attaining this limited uniformity is an important one. *See Pauk* v. *Board of Trustees*, 654 F.2d 856, 862 (2d Cir. 1981); *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978); *Beard* v. *Robinson*, 563 F.2d 331, 337 (7th Cir. 1977); *Smith* v. *Cremins*, 308 F.2d 187, 190 (9th Cir. 1962).
>
> 631 F.2d at 651, n.4

A consistent federal characterization of the essential nature of a federal civil rights action brought pursuant to § 1983 as being an action for injury to personal rights[10] is warranted by § 1988. If there is federal law "adapted to the object" of the civil rights laws, § 1988 commands that the federal courts apply that law in § 1983 actions. *See Chardon* v. *Fumero Soto*, ___ U.S. ___, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983); *Robertson* v. *Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). The Tenth Circuit's decision to uniformly characterize civil rights claims as injuries to personal rights and then look to the individual state limitations period that applies to such an injury is consistent with the legislative history of the Reconstruction-Era Civil Rights statutes. *See infra*, Point I-C. It also results in a firmly defined and easily applied rule. "Few areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." *Chardon* v. *Fumero Soto*, ___ U.S. at ___, 103 S.Ct. at 2621, 77 L.Ed.2d at 88 (Rehnquist, J., dissenting).

All the collateral and needless litigation on these limitations period questions has taken its toll on the federal Court system.[11] For example, on the very same day *Garcia* v. *Wilson*

[10] A survey undertaken by the Plaintiff, of the various injury to personal rights or personal injury statutes of limitations of the several states of this country and the territories, shows that there is a wide diversity of limitations periods and not nationwide uniformity using the approach adopted by the Tenth Circuit. *See* Appendix, Part B.

[11] This limited uniformity in the method of characterization is certainly more judicious and consistent with the remedial nature of § 1983 than the haphazard development in the law to date in which many civil rights litigants, plaintiffs and defendants alike, have no settled expectation, or even hunch, of which limitations period will be applied to their case. *See e.g., Polite* v. *Diehl*, 507 F.2d 119 (3rd Cir. 1974) *(en banc). See also* Jarmie, *Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Acts Claims: The Tenth Circuit's Resolution*, 15 N.M.L.Rev. ___, at ___ (1984) and other authorities cited in footnote 9. Numerous Courts, as well, have criticized the lack of any kind of consistent and logical approach to this problem. *See e.g., Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984); *Garmon* v. *Foust*, 668 F.2d 400 (8th Cir.) *(en banc), cert denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982); *Beard* v. *Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied, sub nom., Mitchell* v. *Beard*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 1149 (1978); *Ingram* v. *Steven Robert Corp.*, 547 F.2d 1260, 1263-64 (5th Cir. 1977); *Schorle* v. *City of Greenhills*, 524 F.Supp. 821, 825 (S.D. Ohio 1981); *Gordon* v. *City of Warren*, 415 F.Supp 556, 559-561 (E.D. Mich. 1976).

[12] *See Hamilton* v. *City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir. 1984) (Kansas—2 years); *Mismash* v. *Murray City*, 730 F.2d 1366 (10th Cir. 1984) (Utah—4 years); *McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984) (Colorado—3 years); *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) (New Mexico—3 years); *Pike* v. *City of Mission, Kansas*, 731 F.2d 655 (10th Cir. 1984) (Kansas—2 years); *Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984) (Oklahoma—2 years).

[13] *See* cases collected in the authorities noted in footnotes 9 and 11. The Jarmie article, 15 N.M.L.Rev. ___ (1984) and the Cook and Sobieski text, 2 Civil Rights Actions at 4-1, *et seq.* are both exhaustive, well-documented and analyzed collections of these reported opinions. *See also* Annot., 45 A.L.R.Fed. 548 (1979) (§ 1983 actions); Annot., 29 A.L.R.Fed. 710 (1976) (§ 1981 actions).

was decided by the Tenth Circuit, that Court disposed of six other cases, all of which were pending and had raised the issue of the selection of a state statute of limitations to be applied to civil rights actions.[12] Over the past decade hundreds of conflicting Circuit Court opinions have been issued on statute of limitations questions in federal civil rights actions, and the confusion and inconsistency result primarily where the specific underlying facts and state characterization approach, strenuously urged by the Defendants, has been adopted.[13]

The Tenth Circuit *(en banc)*, in deciding to uniformly characterize all § 1983 actions within the Circuit as actions for injuries to personal rights for statute of limitations purposes, rather than in terms of the specific facts generating a particular suit, has developed an approach to the problem that is consistent with the concept of federalism, mindful of the broad remedial purposes of civil rights legislation, *Mitchum* v. *Foster*, 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2160-62, 32 L.Ed.2d 705 (1972); *United States* v. *Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), and cognizant of the importance of the policies of certainty and repose embodied in state statutes of limitations. *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487-89, 100 S.Ct. 1790, 1796-97, 64 L.Ed.2d 440 (1980); *Holmberg* v. *Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946); *Campbell* v. *Haverhill*, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1985). The Tenth Circuit also weighed the history of the Civil Rights Acts in a manner that is consistent with the understanding of this Court that:

> In the Civil Rights Acts, Congress established causes of action arising out of rights and duties under the Constitution and federal statutes. These causes of action exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. They are judicially enforceable in the first instance. The statutes are characterized by broadly inclusive language. They do not limit who may bring suit, do not limit the cause of action to a circumscribed set of facts, nor do they preclude money damages or injunctive relief. An appropriate limitations period must be responsive to these characteristics of litigation under the federal statutes. *A state law is not 'appropriate' if it fails to take into account* practicalities that are involved in litigating federal civil rights claims and *policies that are analogous to the goals of the Civil Rights Acts.*
>
> *Burnett* v. *Grattan*, ____ U.S. at ____, 104 S.Ct. at 2930, 82 L.Ed.2d at 44-45. [Emphasis added.]

The decision in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984) is based on law, logic, and reason and will further the administration of justice in the federal Courts by avoiding the volumi-

nous litigation caused by the uncertainty of state law characterization and analogies.

C. The Decision To Uniformly Characterize All § 1983 Actions As Being Actions For Injuries To Personal Rights Is Confirmed By The Legislative History Of The Reconstruction-Era Civil Rights Acts.

The method of characterization of federal civil rights claims employed by the Tenth Circuit in *Garcia* v. *Wilson* is supported by the legislative history of the Reconstruction-era Civil Rights Acts. The Tenth Circuit concluded that the rights secured by the Constitution and federal law inhere "in man as a rational being, that is, rights to which one is entitled by reason of being a person in the eye of the law," and that "[I]n the broad sense, every cause of action under § 1983 which is well founded results from personal injuries," and "[T]hat the cause of action for the deprivation of these rights is in essence 'delictual.' " 731 F.2d at 650.

This view is fully confirmed by the legislative history of the Reconstruction-era Civil Rights Acts. § 1988 was first enacted as a portion of § 3 of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27. Section 1 of that Act is the historical source of 42 U.S.C. §§ 1981 and 1982. *Runyon* v. *McCrary*, 427 U.S. 160, 168-169, n.8, 96 S.Ct. 2586, 2593-94, n.8, 49 L.Ed.2d 415 (1976). Section 2 of the Civil Rights Act of 1866 was the model for Section 1 of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983. *Mitchum* v. *Foster*, 407 U.S. 225, 238, n.27, 92 S.Ct. 2151, 2160, n.27, 32 L.Ed.2d 705 (1972).[14] The initial portion of § 3 of the Civil Rights Act of 1866 established federal jurisdiction to hear, *inter alia*, civil actions brought to enforce

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[14] For the initial reading in the Senate by Senator Trumbull of Senate Bill No. 61, to protect all persons in the United States in their civil rights, and furnish the means of their vindication, *see* Cong. Globe, 39th Cong., 1st Sess. 211 (1866). *See also* veto message of President Andrew Johnson, Cong. Globe, 39th Cong., 1st Sess. 1679-1681 (1866); veto override of the Senate and the House, Cong. Globe, 39th Cong., 1st Sess. 1809, 1861 (1866).

§ 1 of the Act. "Section 3 then went on to provide that the jurisdiction thereby established should be exercised in conformity with federal law where suitable and with reference to the common law, as modified by state law, where federal law is deficient. [Footnote omitted.] Considered in context, this latter portion of § 3, which has become § 1988 and has been made applicable to the Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of law to be applied in actions brought to enforce the substantive provisions of the Act, including § 1." *Moor* v. *County of Alameda*, 411 U.S. 693, 705, 93 S.Ct. 1785, 1793-94, 36 L.Ed.2d 596 (1973). 14 Stat. 27.[15]

During the Congressional debates on the Civil Rights Act of of 1866, there was considerable concern amongst certain legislators that the Thirteenth Amendment did not supply the Constitutional power to support the passage of the Act. Thereafter, following the proposal of the Fourteenth Amendment in 1866, Cong. Globe, 39th Cong., 1st Sess. 2286, 3042 (1866) and the ratification of the Fourteenth Amendment in 1868, 15 Stat. 708 (1868) (ratification certified by Secretary of State William Seward), the Civil Rights Act of 1866 was re-enacted in full in the Act of May 31, 1870, c. 114, § 18, 16 Stat. 144.[16] Congress again directed merely that § 1988 would serve as a guide for Courts in the enforcement of the causes of action created by the Act of May 31, 1870. 42 U.S.C. § 1983 was first enacted as Section 1 of the Act of April 20, 1871, c. 22, 17 Stat. 13. This cause of action was made "subject to the sames rights of appeal, review upon error, and other remedies provided in like cases

[15] The pertinent portion of § 3 of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27, is reproduced in the Appendix, Part A.

[16] Section 18 of the Act of May 31, 1870 re-enacted the 1866 Act in full, by reference, and provided that §§ 16 and 17 of the Act would be enforced according to the provisions of the 1866 Act. Section 16 is the precursor of 42 U.S.C. § 1981, and § 17 is the precursor of 42 U.S.C. § 1982. Section 3 of the 1866 Act, now 42 U.S.C. § 1988, was simply incorporated by reference pursuant to § 18 of the Act of May 31, 1870, c. 114, 16 Stat. 144.

. . . under the provisions of the act of the ninth of April, eighteen hundred and sixty six. . . ."[17] Section 1988 subsequently became § 722 of the Revised Statutes and was made generally applicable to the civil rights portions of the Revised Statutes, §§ 1977-1991. *Moor* v. *County of Alameda*, 411 U.S. at 703-706, 93 S.Ct. at 1792-94, 36 L.Ed.2d at 596.

A consistent and common theme throughout this legislative process was that the federal causes of action created by the Reconstruction-era Civil Rights Acts were intended to furnish the means to vindicate the rights of the citizens. As this Court noted in *Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 617-618, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979), ". . . Senator Edmunds recognized in the 1871 debate: 'All civil suits, as every lawyer understands, which this act authorizes, are not based upon it; they are based upon the right of the citizen. The Act only gives a remedy.' " Cong. Globe, 42nd Cong. 1st Sess. 568 (1871).

During these Reconstruction-era debates, the legislators emphasized that these new federal causes of action were designed to afford a remedy for the vindication of personal rights. There were repeated and specific references to the nature of these rights. Senator Trumbull, the sponsor of the 1866 Civil Rights Bill in the Senate (S. No. 61), explained and defined his understanding of the term civil rights:

> Mr. TRUMBULL. The first section of the bill defines what I understand to be civil rights: the right to make and enforce contracts, to sue and be sued, and to give evidence, to inherit, purchase, sell, lease, hold, and convey real and personal property, and to full and equal benefit to all laws and proceedings for the security of person and property. These I understand to be civil rights, fundamental rights belonging to every man as a free man, and which under the Constitution as it now exists we have a right to protect every man in.
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> Cong. Globe, 39th Cong., 1st Sess. 476 (1866)

[17] Section 1 of the Act of April 20, 1871, taken from The Appendix to the Congressional Globe, 42nd Cong., 1st Sess. 335, (17 Stat. 13) is reproduced in the Appendix, Part A.

Even an arch enemy of this civil rights bill, Senator Saulsbury, acknowledged and recognized this nature of a civil right. He said, "[W]hat is a civil right? It is a right that pertains to me as a citizen." Cong. Globe, 39th Cong., 1st Sess. 606 (1866). Senator Trumbull expounded at length about the nature of the fundamental rights of a citizen. Cong. Globe, 39th Cong., 1st Sess. 474-475, 599-600. His view was echoed in the House of Representatives by Rep. Wilson, the sponsor of the legislation in the House. Rep. Wilson declared:

> . . . Well, what is the meaning? What are civil rights? I understand civil rights to be simply the absolute rights of individuals, such as—
>
> 'The right of personal security, the right of personal liberty, and the right to acquire and enjoy property.' 'Right itself, in civil society, is that which any man is entitled to have, or to do, or to require from others, within the limits of prescribed law.'—*Kent's Commentaries*, vol. 1, p. 199.
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> * * * *
>
> The definition given to the term 'civil rights' in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this:
>
> 'Civil rights are those which have no relation to the establishment, support, or management of government.'
>
> From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.
>
> * * * *
>
> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. *We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen.* I am aware, sir, that this doctrine is denied in many of the States; but this only proves the necessity for the enactment of the remedial and protective features of this bill. If the States would all observe the rights of our citizens, there would be no need of this bill. [Emphasis added.]
>
> Cong. Globe, 39th Cong., 1st Sess. 1117 (1866)

The sponsors of the Civil Rights Act of 1866 set out their understanding of the nature of the fundamental rights of a person to personal security, personal liberty, and of personal property.[18] They did not distinguish between these rights for enforcement purposes. They did not distinguish between these rights based upon the employment status of the violators. Nor did they distinguish between these rights based upon the underlying conduct, or the specific facts which generated the violation of the rights. All of these rights were seen as ". . . the great fundamental rights which belong to all men." *Id.* at 1118.[19] The understanding of the nature of these rights carried

[18] Rep. Wilson illustrated the rights of personal security, personal liberty, and personal property, as follows: "What are these rights? Certainly they must be as comprehensive as those which belong to Englishmen. And what are they? Blackstone classifies them under three articles, as follows: 1) *The right of personal security;* which he says, 'Consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.'; 2) *the right of personal liberty;* and this, he says, 'Consists in the power of locomotion, of changing situation, or moving one's person to whatever place one's own inclination may direct, without imprisonment, or restraint, unless by due course of law.'; 3) *the right of personal property*, which he defines to be, 'The free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.'—*Sharswood's Blackstone*, vol. 1, chap 1. In his lecture on the absolute rights of persons, Chancellor Kent (Kent's Commentaries, volume one, page 599) says: 'The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country, to be natural, inherent, and inalienable.' " Cong. Globe, 39th Cong., 1st Sess. 1118 (1866).

[19] *See also, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1291 (1866) (Bingham); *Id.* at 1293 (Shellabarger); *Id.* at 1294-95 (Wilson); *Id.* at 1757-60 (Trumbull); *Id.* at 1832-37 (Lawrence).

on in the 42nd Congress, during the debates which led to the passage of § 1 of the Civil Rights Act of April 20, 1871, now codified as 42 U.S.C. § 1983.[20] Moreover, it is clear that Congress specifically directed the federal Courts to enforce the Civil Rights Act by giving substance to its provisions.

Thus, the propriety of the characterization of a § 1983 civil rights claim as an action for injury to personal rights is shown by the review of the legislative history of the Reconstruction-era Civil Rights Acts. The rights themselves were seen as being unified in a person. The focus was on the injury to the person by the deprivation of these fundamental rights. These Acts provided a remedy for the enforcement of these rights. But, "[I]t remains true that one cannot go into Court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything." *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). As has been demonstrated, "[t]he remedy provided by Section 1983 is statutory in origin, but the underlying liability it enforces stems primarily from the Constitution." *Garcia* v. *Wilson*, 731 F.2d at 650. A deprivation of these rights results in a personal injury, *Almond* v. *Kent*, 459 F.2d 200, 204 (4th Cir. 1972), and "[a] deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right." *Monroe* v. *Pape*, 365 U.S. 167, 196, 81 S.Ct. 473, 488, 4 L.Ed.2d 492 (1961) (Harlan, J., concurring), *overruled on other grounds*, *Monell* v. *Dep't of Social Services*,

[20] *See e.g.*, Remarks of Senator Edmunds, Cong. Globe, 42nd Cong., 1st Sess. 567-68 (1871); *Id.* at 575-77 (Trumbull); *See also* Appendix, Cong. Globe, 42nd Cong., 1st Sess. 68-71 (1871) (Shellabarger); *Id.* at 83-86 (Bingham); *Id.* at 224-30 (Boreman), citing *Corfield* v. *Coryell*, 4 Washington's U.S. Circuit Court Reports 371, 380-381 (1823)); *Id.* at 254-57 (Wilson); *Id.* at 312-16 (Burchard). *See Monell* v. *New York City Dep't of Social Services*, 436 U.S. 658, 670-71, 98 S.Ct. 2018, 2025, 56 L.Ed.2d 611 (1978).

436 U.S. 658 (1978). Based upon these principles, the Court of Appeals borrowed the most appropriate, and analogous, New Mexico limitations period, the personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978), and applied it to this case.[21] Since this lawsuit was filed within three years of the occurrence of the injury, the suit was timely filed.

II. The New Mexico Tort Claims Act (NMTCA) Does Not Create An Identical Action To One Filed Under § 1983 And The NMTCA Is Not The Most Analogous Or Appropriate New Mexico Cause Of Action To Be Applied To § 1983 Because The Structure Of The NMTCA Frustrates The Policies And Purposes Of § 1983 And The Application Of The NMTCA To § 1983 Actions Is Inconsistent With The Constitution And Laws Of The United States.

The Tenth Circuit *(en banc)* properly ruled that the limitations period contained in the New Mexico Tort Claims Act (hereinafter "NMTCA") is not the controlling and appropriate New Mexico limitations period for § 1983 actions. 731 F.2d at 651, n.5.[22] The express language of the NMTCA specifically

[21] If this Court were to determine, nevertheless, that a § 1983 action is an action based upon statute, contrary to the analysis presented herein, nevertheless, the Complaint filed in this case would be timely filed. *See* Pet. Cert. App. 43-44. *See also Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980); *Pauk* v. *Board of Trustees*, 654 F.2d 856, 861-866 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1631, 71 L.Ed.2d 866 (1982); *Beard* v. *Robinson*, 563 F.2d 331 (1977), *cert. denied sub nom.*, *Mitchell* v. *Beard*, 438 U.S. 907, 98 S.Ct. 3125, 57 L.Ed.2d 54 (1978); *Smith* v. *Cremins*, 308 F.2d 187 (9th Cir. 1962). *See* R. Stern and E. Gressman, *Supreme Court Practice*, 478 (5th Ed. 1978); *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1977) for the proposition that Respondent can advance any ground, even one rejected or not raised below, in support of the judgment in his favor.

[22] N.M. Stat.Ann., § 41-4-15 (1978), the NMTCA limitations provision, reads in pertinent part:

41-4-15. Statute of Limitations.

A. Actions against a governmental entity or a public employee *for torts* shall be forever barred, unless such action is

indicates that tort actions are separate and apart from actions for the redress of federal constitutional rights such as are available under 42 U.S.C. § 1983.[23] *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982).

The New Mexico Supreme Court, in a reasoned opinion which examined the difference between a cause of action under the NMTCA and a § 1983 action, stated that "the New Mexico Legislature recognizes that a tort is separate and distinct from a constitutional deprivation." *Wells* v. *County of Valencia*, 98 N.M. at 6, 644 P.2d at 520 (1982). The opinion in *Wells* is totally inconsistent with the prior statements of the New Mexico Courts in *DeVargas* v. *State ex rel. Dep't of Corr.*, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), *cert. quashed as improvidently issued, State* v. *DeVargas*, 97 N.M. 563, 642 P.2d 166 (1982), and the position asserted by the Defendants. In *Wells*, the New Mexico Supreme Court recognized the significant difference between a § 1983 cause of action and a cause of action under the NMTCA.[24]

commenced within two years after the date of occurrence resulting in loss, injury or death, except that a minor under the full age of seven years shall have until his ninth birthday in which to file. This subsection applies to all persons regardless of minority or other legal disability. [Emphasis supplied.]

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[23] Thus, the New Mexico Tort Claims Act is quite different from the Oregon Tort Claims Act discussed in *Kosikowski* v. *Bourne*, 659 F.2d 105 (9th Cir. 1981). In *Kosikowski* there was an express legislative determination to apply the Oregon Tort Claims Act two-year limitation provision to § 1983 actions. 659 F.2d at 107. Nevertheless, the Court in *Kosikowski* recognized that even an express legislative determination could frustrate the purposes served by federal law. 659 F.2d at 107. Exposing the extreme difficulty of anything other than a federal characterization of federal civil rights claims based upon federal law, the Ninth Circuit in *Kosikowski*, on rehearing, refused to apply the Oregon Tort Claims Act to actions brought pursuant to 42 U.S.C. § 1981, leaving the limitations period for § 1981 actions at six years. *Kosikowski* v. *Bourne*, 659 F.2d 105, 108 (9th Cir. 1981) *(on rehearing) (en banc)*. *Compare EEOC* v. *Gaddis*, 733 F.2d 1373, 1376-1378 (10th Cir. 1984) (§ 1981 action is in essence an action for injury to personal rights. In the same state, the limitations period for § 1981 and 1983 actions are the same).

A. The NMTCA Limitations Period, § 41-4-15, Refers Exclusively To Torts, Does Not Pertain To Actions For The Deprivation Of Constitutional Rights And Its Application To § 1983 Actions Is Inconsistent With The Constitution And Laws Of The United States.

In reaching the conclusion that § 1983 actions and NMTCA actions are separate and distinct concepts, the Court in *Wells*, and Chief Federal District Judge Bratton, in *Garcia* v. *Wilson*, (Pet. Cert. App. 38-40), analyzed basically the same provisions of the NMTCA. Chief Judge Bratton and the Court in *Wells* observed that the NMTCA specifically and consistently distinguished between torts, property rights, and constitutional deprivations.[25] The Federal District court concluded that:

[24] The New Mexico Supreme Court in *Wells* noted:

[t]he United States Supreme Court recognizes that, although a Section 1983 action can grow out of tortious conduct, the two are distinct concepts compensable under different laws. Tortious conduct which does not amount to a constitutional violation does not state a cause of action under Section 1983, but may be fully compensable under a state remedy for a tortious loss. [Citation omitted.] [Emphasis supplied.]

Wells v. *County of Valencia*, 98 N.M. 3, at 5-6; 644 P.2d 517, at 519-520.

The provisions of the NMTCA demonstrate that the New Mexico Legislature distinguished between torts and constitutional violations. *See* Kovnat, *Constitutional Torts and the New Mexico Tort Claims Act*, 13 N.M.L.Rev. 1, at 45-50 (1983).

[25] For example, "Section 41-4-4(B) of the NMTCA provides that a governmental entity or employee while acting within the scope of his or her duty be defended against a claim for any tort *or* any violation of property rights *or* any rights, privileges, or immunities secured by the Constitution of the United States. N.M.Stat.Ann. § 41-4-4(B) (Cum.Supp. 1981) (emphasis added). Similarly, N.M.Stat.Ann. § 41-4-12 (1978) waives immunity for actions against law enforcement officers acting within the scope of their duties for '[certain specified torts], violation of property rights *or* deprivation of any rights, privileges or immunities secured by the Constitution and laws of the United States . . .' (emphasis added)." (Pet. Cert. App. 38.)

The language in the NMTCA's statute of limitations provision is equally unambiguous. It provides that:

> Actions against a governmental entity or a public employee for *torts* shall be forever barred, unless such action is commenced within two years after the date of occurrence resulting in loss, injury or death. . . .

N.M.Stat.Ann. § 41-4-15(A) (1978) (emphasis added).

Thus, the plain language of the NMTCA indicates that the Legislature did not intend the term 'tort' to include actions arising under § 1983. In construing New Mexico statutes, this Court must do so with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature. N.M.Stat.Ann. § 12-2-2 (1978). No intent to include § 1983 actions within the meaning of the term 'tort' in the NMTCA can be fairly read into the NMTCA as it now stands.

Garcia v. *Wilson*, Pet. Cert. App. at 38-39.

Accord, *Wells* v. *County of Valencia*, 98 N.M. at 6, 644 P.2d at 520 ("Since the Legislature distinguishes a tort from a constitutional violation, it is reasonable to presume that they recognize the existence of a Section 1983 remedy for such violations"). *Martinez* v. *The Board of Education of the Taos Municipal School District*, ___ F.2d ___, Nos. 83-1680, 1764 (10th Cir. 1984).[26]

Contrary to the assertions of the Defendants, N.M.Stat. Ann. § 41-4-12 (1978) of the NMTCA does not create the

[26] *See also Garmon* v. *Foust*, 668 F.2d 400 (8th Cir.) *(en banc)*, *cert. denied*, 456 U.S. 998, 102 S.Ct. 2283, 73 L.Ed.2d 1294 (1982) (tort analogy unduly cramps the significance of § 1983 as a broad, statutory remedy); *Carlson* v. *Green*, 446 U.S. 14, 20-23, 100 S.Ct. 1468, 1472-74, 64 L.Ed.2d 15 (1980) (recognizing the distinction between an action for the deprivation of constitutional rights and a Tort Claims Act remedy).

same cause of action as 42 U.S.C. § 1983.[27] Although § 41-4-12 purports to waive immunity for law enforcement officers,[28] that section of the NMTCA does not have the same breadth and scope as a § 1983 action. The essential elements of a § 1983 action are (1) the denial under color of law (2) of a right secured by the Constitution and laws of the United States. *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), *overruled on other grounds*, *Monell* v. *Dep't of Social Services*, 436 U.S. 658 (1978); *Parratt* v. *Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Section 41-4-12 of the NMTCA does not provide a cause of action against a law enforcement officer who acts under color of law but outside the scope of the officer's duties. In fact, the NMTCA bars such an action by requiring the officers to act within the scope of their duties as an element that must be proven under § 41-4-12. Section 1983 provides a cause of action under these same circumstances.

[27] N.M.Stat.Ann. § 41-4-12 (1978) reads:

41-4-12. Liability; law enforcement officers.

The immunity granted pursuant to Subsection A of Section 41-4-4 NMSA 1978 does not apply to liability for personal injury, bodily injury, wrongful death or property damage resulting from assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, defamation of character, violation of property rights or deprivation of any rights, privileges or immunities secured by the constitution and laws of the United States or New Mexico when caused by law enforcement officers while acting within the scope of their duties.

[28] It is interesting to note that Defendant Vigil, as former Chief of the New Mexico State Police, takes the position in this Court that he is a "law enforcement officer" and therefore entitled to the benefits of the NMTCA, but in another case Defendant Vigil, as former Chief of the New Mexico State Police, takes the opposite position that he is not a law enforcement officer and, therefore, is immune from suit under the NMTCA. *Dennis Salazar, et al.* v. *David Stewart, et al.*, First Judicial District, County of Rio Arriba, State of New Mexico, No. RA 83-241(C), Defendant Martin Vigil's Motion for Summary Judgment filed June 21, 1984.

See Stengel v. *Belcher*, 522 F.2d 438 (6th Cir.), *cert. granted*, 425 U.S. 910, *cert. dismissed*, 429 U.S. 118 (1976). The fact that an officer was acting outside the scope of his duties will be a defense to a NMTCA action, but it will not defeat a § 1983 claim where the officer was acting under "color of law" and outside the course and scope of his duties. *See Cameron* v. *City of Milwaukee*, 102 Wis.2d 448, 307 N.W.2d 164 (Wisc.Sup.Ct. 1981); *Davis* v. *Murphey*, 559 F.2d 1098 (7th Cir. 1977).

The action allowed by § 41-4-12 of the NMTCA for Constitutional deprivations is very different from, and much more limited than a § 1983 action. Section 1983 serves basically two functions: it deters future governmental action that violates a person's civil rights, and it compensates the injured party. *Owen* v. *City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). There is no statutory limitation on the amount of damages an injured party can be awarded in a § 1983 action. *Burnett* v. *Grattan*, ___ U.S. at ___, 104 S.Ct. at 2930, 82 L.Ed.2d at 44-45 (1984). In addition, punitive damages are allowed to be awarded in § 1983 actions under proper circumstances. *Smith* v. *Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983). The NMTCA has statutory limitations on damages and does not allow the recovery of punitive damages.[29]

A further example of the derogation of rights a civil rights litigant has under the NMTCA is the requirement of notice provision contained within § 41-4-16 of the NMTCA (Brief Op. App. 1-3). This notice provision applies to the entire NMTCA, including § 41-4-12, the law enforcement officers section, and § 41-4-15(A), the two-year limitation period of the NMTCA. Section 41-4-16A requires a person claiming damages against the State or a local public body to give written notice of the claim to a specified governmental official "within ninety (90)

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[29] Section 41-4-19(A) of the NMTCA provides a limitation on damages, and only covers a public employee who has acted within the scope of his duties. Section 41-4-19(B) precludes any award of punitive damages under the NMTCA. *See* Brief Op. App. at 3-4.

days after an occurrence giving rise to a claim for which immunity has been waived under the Tort Claims Act." Section 41-4-16B provides an absolute defense to a claim for damages under the NMTCA unless the requisite written notice has been given as required by § 41-4-16A, or unless the governmental entity had actual notice of the occurrence. Section 41-4-16C lengthens the notice period to six (6) months in a wrongful death situation.

The New Mexico Courts have interpreted this notice provision as being in the nature of a statute of limitations. *See Ferguson* v. *New Mexico State Highway Commission*, 99 N.M. 194, 656 P.2d 244 (Ct.App. 1982). Since the 90-day notice provision section applies to the entire NMTCA, the 90-day notice required by § 41-4-16A is required even for constitutional deprivations. In *Childers* v. *Ind. Sch. Dist. No. 1 of Bryan Cty.*, 676 F.2d 1338, 1343 (10th Cir. 1982), the Tenth Circuit stated that "a plaintiff seeking in federal court to vindicate a federally created right cannot be made to jump through the procedural hoops for tort-type cases that may have commended themselves to the legislative assemblies of the several states." *Burnett* v. *Grattan*, ___ U.S. at ___ n.9, 104 S.Ct. at 2928 n.9, 82 L.Ed.2d at 42 n.9 (1984); *Brown* v. *United States*, 742 F.2d 1498 (D.C.Cir. 1984) *(en banc)* (non-compliance with D.C. notice of claims provision did not bar federal claims), *overruling in part*, *McClam* v. *Barry*, 697 F.2d 366 (D.C.Cir. 1983). From this comprehensive review of the NMTCA, it is clear that the policies and procedures of the NMTCA frustrate and interfere with the implementation of the national policies underlying federal civil rights actions. This Court, in *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355, at 367, 97 S.Ct. 2447, at 2455, 53 L.Ed.2d 402 (1977), made it clear that the federal policy behind the civil rights statutes must be considered when a choice is to be made among the various state limitation statutes.

> State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of

national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' [Citations omitted.] State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.'

The structure of the NMTCA impedes the remedial and deterrent purposes of a § 1983 action. The use of N.M. Stat. Ann. § 37-1-8, the New Mexico personal injury statute, which has no restriction on recovery of compensatory damages, which allows for the recovery of punitive damages, which has no restrictive notice provisions, and which does not discriminate between violators, clearly furthers the dual purposes of § 1983. The NMTCA does not.

B. The Application Of The *DeVargas* Decision And The NMTCA To § 1983 Actions Discriminates Against The Federal Cause Of Action And Creates Arbitrary Results That Are Inconsistent With The Constitution And Laws Of The United States.

The step three inquiry of *Burnett* v. *Grattan*—whether a state rule of decision is inconsistent with the Constitution or federal law—is made "when a State legislature has enacted a statute of limitations specifically applicable to actions brought under one or all of the Reconstruction-era Civil Rights Acts." ___ U.S. at ___ n.15, 104 S.Ct. at 2931 n.15, 82 L.Ed.2d at 46 n.15. Discrimination between federal and state claims is inconsistent with the Constitution and federal law. *See e.g.*, *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978) (rejecting Virginia's express one-year statute of limitations for § 1983 actions as discriminating against federal cause of action because the state personal injury statute was two years).

New Mexico does not have any express statute of limitations that applies to any of the Reconstruction-era Civil Rights actions. The Defendants urge this Court to adopt the statute of limitations assertion posited by the New Mexico Courts in *DeVargas* v. *State ex rel. Dep't. of Corr.*, 97 N.M. 447, 640 P.2d 1327 (Ct.App. 1981), *cert. quashed as improvidently issued*, *State* v. *DeVargas*, 97 N.M. 563, 642 P.2d 166 (1982) (J.A.

15-16). The opinion of the New Mexico Court of Appeals in *DeVargas*, and the Decision on Certiorari by the New Mexico Supreme Court in *DeVargas* (J.A. 15-16) demonstrate a lack of understanding of the significant differences between a tort claims action and a § 1983 action. These decisions are also inconsistent with the subsequent decision of the New Mexico Supreme Court in *Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982). The effect of the *DeVargas* decision is to single out federally protected rights for harsher and discriminatory treatment as opposed to state protected rights, and to intertwine § 1983 actions with the NMTCA limitations procedures and policies.

In New Mexico, "the nature of the right sued upon, and not the form of action or relief demanded, determines the applicability of the statutes of limitations." *Rito Cebolla Inv. Ltd.* v. *Golden West Land*, 94 N.M. 121, 126-27, 607 P.2d 659, 664-65 (Ct.App. 1980); *Taylor* v. *Lovelace Clinic*, 78 N.M. 460, 462, 432 P.2d 816, 818 (1967). *Cf.*, *Runyon* v. *McCrary*, 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). As has been demonstrated *supra*, at Point I-A, the essential nature of a deprivation of civil rights is an injury to personal rights. *Garcia* v. *Wilson*, 731 F.2d at 651; *Garcia* v. *University of Kansas*, 702 F.2d 849 (10th Cir. 1983). The New Mexico Court of Appeals, in *DeVargas*, ignored the law of New Mexico that the nature of the right determines the applicability of a statute of limitations. 97 N.M. at 451, 640 P.2d at 1331. *Taylor* v. *Lovelace Clinic*, *supra*. Under its interpretation, the claims in *DeVargas* were time barred so the New Mexico Court of Appeals made no choice between the two-year NMTCA statute, or the three-year personal injury statute, N.M.Stat.Ann. § 37-1-8 (1978). 97 N.M. at 451, 640 P.2d at 1331. The New Mexico Supreme Court issued a Decision on Certiorari quashing the Writ of Certiorari as improvidently issued. 97 N.M. 563, 642 P.2d 166 (1982) (J.A. 15).[30] In that decision on certiorari, the

[30] The *DeVargas* Decision on Certiorari was originally not to be published as a Formal Opinion of the New Mexico Supreme Court. Affidavit of Rose Marie Alderete, Clerk, Rule 7, Supreme Court

Court, in *dicta*, stated that the appropriate New Mexico limitations period for § 1983 actions is the two-year limitation period of the NMTCA. 97 N.M. at 564, 642 P.2d at 167.

The *DeVargas* decision on certiorari is flawed in many ways. First, it contains absolutely no effort to characterize the essential nature of a § 1983 action. It is unclear whether the Court applied the NMTCA limitations period to all § 1983 claims, even those not coming within any arguable confines of the NMTCA. (J.A. 15) The decision does not acknowledge the uniquely federal concerns of the Reconstruction-era Civil Rights Acts, and it does not recognize the difference between a tort and a constitutional deprivation. *Compare Wells* v. *County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982).

The *DeVargas* decision also creates a discriminatory effect against federal causes of action. For example, under *DeVargas*, a citizen who suffers a simple assault at the hands of a private party has three years to bring suit (N.M.Stat.Ann. § 37-1-8 (1978)) while a citizen, such as the Plaintiff, who is brutally and viciously beaten by a law enforcement officer acting under color of law, would have only two years to bring suit (N.M.Stat.Ann. § 41-4-15 (1978)). *See Johnson* v. *Glick*, 481 F.2d 1028 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973). This discriminatory result is certainly inconsistent with the Constitution and federal law. *Burnett* v. *Grattan*, ___ U.S. at ___, 104 S.Ct. at 2931, 82 L.Ed.2d at 46. *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978).

Misc. Rules, Judicial Pamphlet No. 9, 1980 Cum.Supp. (J.A. 19-22). The Decision on Certiorari was published after the Plaintiff filed his Reply to Motion to Call New Authority to Attention of the Court (J.A. 19). The language regarding the appropriate § 1983 limitations period from the New Mexico Supreme Court decision quashing certiorari in *DeVargas* is dicta, and a decision quashing certiorari is of no precedential value and indicates nothing more than the reviewing Court's conclusion that the case ". . . is not appropriate for adjudication." *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S.Ct. 614, 619, 99 L.Ed. 897 (1955) (on rehearing); *See also Gonzales* v. *Stanke-Brown Assoc., Inc.*, 98 N.M. 379, 388, 648 P.2d 1192, 1201 (Ct.App. 1982) (Sutin, J., specially concurring).

To the extent that the *DeVargas* decision (J.A. 15) is read as uniformly applying the NMTCA limitations period to all § 1983 actions, then this decision applies to cases such as First Amendment public employee free speech cases and Fifth Amendment zoning due process cases. Based upon the underlying conduct analysis urged by the Defendants, these § 1983 causes of action are not remotely analogous or similar to the causes of action created by the NMTCA. If the *DeVargas* decision (J.A. 15) is read as applying solely to law enforcement officers (a point not clear from the decision) as the Defendants are currently advocating, then the decision also has numerous discriminatory and arbitrary results. For instance, in civil rights conspiracy-type cases involving a law enforcement officer and a private individual, or public employee not covered by the NMTCA, the NMTCA two-year limitations period, § 41-4-15, would apply to the law enforcement officer, but either the three-year statute, § 37-1-8, or the four-year statute, § 37-1-4, would apply to the other individuals (Pet. Cert. App. 48). In the same case, different limitations periods would apply to the federal cause of action based upon the status of the violator. In addition, the NMTCA does not apply to the causes of action created by 42 U.S.C. §§ 1981, 1982 and 1985 except as to law enforcement officers, as specified in § 41-4-12.

Among the potential civil rights actions that the Defendants' method would treat in this discriminatory and arbitrary manner, and that are not even necessarily covered by the NMTCA, are a cause of action against a law enforcement officer and a private citizen for conspiracy to violate the constitutional rights of another person. *Cf., Dennis* v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); a cause of action against a law enforcement officer for conspiring with a public employee not covered by the NMTCA to violate the constitutional rights of another person; a claim against a City Manager for violating the constitutional rights of another person; a claim against a City Manager for the failure to train, supervise, discipline and control a municipal police officer who violates the constitutional rights of citizens when the failure directly causes the violation of rights; *McClellan* v. *Facteau*, 610 F.2d 693

(10th Cir. 1979); a substantive due process cause of action against a public employee, like a school teacher, for a brutal and vicious beating administered under color of law by that public employee. *See e.g., Hall* v. *Tawney*, 621 F.2d 607 (4th Cir. 1980); a cause of action on behalf of any public employee, except a police officer for a First Amendment claim. *Perry* v. *Sindermann*, 408 U.S. 598, 92 S.Ct. 2717, 33 L.Ed.2d 570 (1972); and an employment discrimination or retaliatory discharge claim, *see e.g., Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979).

The discriminatory effect on § 1983 actions, created by the *DeVargas* decision on certiorari, which seeks to apply the limitations period for torts contained in the NMTCA to federal civil rights actions, even those not arguably included in the NMTCA, evidences a concept of state sovereign immunity that is hostile to the federal cause of action. Federal Courts have repeatedly refused to engraft such state interpretations onto the federal remedy created by § 1983, and they have refused to allow state concepts of sovereign immunity to undermine the broad, remedial purposes of § 1983. *See e.g., Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984); *Childers* v. *Ind. Sch. Dist. No. 1 of Bryan Cty.*, 676 F.2d 1338, 1342-43 (10th Cir. 1982); *Donovan* v. *Reinbold*, 433 F.2d 738, 742 (9th Cir. 1970); *Gunther* v. *Miller*, 498 F.Supp. 882, 882-83 (D.N.M. 1980).

A state policy which provides citizens a shorter time to sue public employees under a State Tort Claims Act for state-created rights than is allowed for a similar type claim against a private person may be appropriate in view of the policies of repose and the purpose of a State Tort Claims Act which is to restrict government susceptibility to suit. *See Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980). It is a far different matter when the discriminatory policy is directed against the remedial federal cause of action embodied in § 1983. Federal Courts will reject the application of any such discriminatory limitations period even where a state legislature has expressly provided for the shorter limitations period for the § 1983 claim than for

similar common law claims. *Burnett* v. *Grattan*, ____ U.S. at ____ n.15, 104 S.Ct. at 2931 n.15; *Johnson* v. *Davis*, 582 F.2d 1316 (4th Cir. 1978).

C. The § 1983 Action In This Case Is A Federal Action Filed In Federal Court Seeking The Vindication Of Federal Rights Based Upon A Uniquely Federal Remedy And Is Not Dependent Upon An Interpretation Of State-Created Rights And The Decision To Disregard *DeVargas* Does Not Implicate The Principles Of Federalism.

The Defendants claim that the refusal of the Tenth Circuit to follow *DeVargas* violates the principles of federalism. The conflict regarding the appropriate New Mexico limitations period for § 1983 cases began when the New Mexico Courts in *DeVargas* ignored existing federal precedent. *Hansbury* v. *Regents of the University of California*, 596 F.2d 944 (10th Cir. 1979); *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980). The federal courts in this case have not violated any principles of federalism. This is a federal action in federal court involving the vindication of federal rights based upon a distinctly federal remedy. In *Guaranty Trust Co.* v. *York*, 326 U.S. 99, at 109, 65 S.Ct. 1464, at 1470, 89 L.Ed. 2079 (1945), Justice Frankfurter explained the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938):

> In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as if it would be tried in a State Court.

See also Holmberg v. *Armbrecht*, 327 U.S. 392, 395, 66 S.Ct. 582, 584, 90 L.Ed. 743 (1946). The cases cited by the Defendants are inapposite because this is not a case dealing solely with issues of state law that is in the federal Court solely on account of the diversity of citizenship of the parties. *See e.g., Bauserman* v. *Blunt*, 147 U.S. 647, 13 S.Ct. 466, 37 L.Ed. 316 (1893). This is not a case where the rights are derived from state law. *See e.g., Dibble* v. *Bellingham Bay Land Co.*, 163 U.S. 63, 16

S.Ct. 939, 41 L.Ed. 72 (1896); *Leffingwell* v. *Warren*, 67 U.S. (2 Black) 599 (1862). The *Erie* v. *Tompkins* concerns simply do not apply. *Holmberg* v. *Armbrecht*, 327 U.S. 392, 66 S.Ct. 582, 90 L.Ed. 743 (1946).

The NMTCA limitations provision is not the appropriate nor the most analogous New Mexico limitations period for borrowing purposes to be applied in this case. The history of the Reconstruction-era Civil Rights statutes does not reflect any recognition of the need to split the federal causes of action based upon the underlying conduct of the violator, or the employment, or official status of the violator. The Defendants pose all sorts of scenarios for the violation of federally secured rights, and for the method, manner and status of the violator suggesting somehow that differing limitations periods within the State of New Mexico further the goals of the Reconstruction-era Civil Rights Acts (Pet. Brief 25-37). Yet, the Defendants fail to acknowledge that many causes of action authorized by § 1983, against many different types of potential defendants, are not even covered by the NMTCA. The Defendants propose an ad hoc determination of the appropriate New Mexico limitations period each and every time a § 1983 claim is filed, and for each and every aspect of the claim. They assert that different limitations periods should apply based upon the conduct and status of the offender. This analysis is inconsistent with the legislative history of the Reconstruction-era Civil Rights Acts and has created chaos in the federal Courts.[31] Such a result has been highly unsatisfactory. The time-honored wisdom of *Smith* v. *Cremins*, 308 F.2d 187 (9th Cir. 1962) bears repeating here:

> Inconsistency and confusion would result if the single cause of action created by Congress were fragmented in accordance with analogies drawn to rights created by state law and the several differing periods of limitations applicable to each state-created right were applied to the single federal cause of action.
>
> 308 F.2d at 190

[31] *See* footnotes 9, 11, 13, and accompanying text.

Inconsistency and confusion have arisen from the method advocated by the Defendants. Collateral litigation on these statutes of limitations questions have burdened the federal Courts for years. The Tenth Circuit has developed a consistent approach to the problem of characterization that is firmly defined and easily applied. This manner of characterizing the federal claim is based upon the antecedent context of the development of the federal causes of action and their remedial nature. At the same time, once the federal civil rights action is characterized as an injury to personal rights according to federal law, deference is made to the individual policies of repose of the several states. The Tenth Circuit's method should be followed. It works.

III. Assuming Arguendo That This Court Determines That The New Mexico Statute Of Limitations For A § 1983 Action Is The New Mexico Tort Claims Act Statute, Then This Court Should Follow The Established Rule Of Law And Give The New Interpretation Prospective Application So As To Not Bar The Claim Of The Plaintiff.

The Complaint in this case was filed on January 28, 1982 (J.A. 4). At that time, the United States Court of Appeals for the Tenth Circuit, in *Hansbury* v. *The Regents of the University of California*, 596 F.2d 944, 949 (10th Cir. 1979), and the United States District Court for the District of New Mexico, in *Gunther* v. *Miller*, 498 F.Supp. 882, 882-83 (D.N.M. 1980), had both held that the appropriate New Mexico limitations period which governed the filing of § 1983 actions was the four-year period found in N.M.Stat.Ann. § 37-1-4 (1978). The decision in *Gunther* v. *Miller* specifically rejected the application of the NMTCA two-year limitation period to civil rights actions. 498 F.Supp. at 882-83. In addition, at the time of the filing of this lawsuit, the annotations to the New Mexico Statutes, under the NMTCA statute of limitations provision, specifically stated that the section was inapplicable to federal civil rights

actions.[32] Moreover, it was the settled rule in the Tenth Circuit that where a claim could be characterized in more than one fashion, the longer statute of limitations should be applied. *Shah* v. *Halliburton*, 627 F.2d 1055, 1059 (10th Cir. 1980), *overruled*, *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984).

At the time of the filing of the lawsuit in this case, no decision existed which stated that the proper statute of limitations under New Mexico law for suits filed under § 1983 is the two-year statute found in the NMTCA, § 41-4-15. The *DeVargas* decision of the intermediate New Mexico Court of Appeals, while improperly rejecting the federal analysis regarding the statute of limitations approved by the Tenth Circuit, and the New Mexico Federal District Courts, specifically did not decide whether the appropriate New Mexico statute of limitations for filing suits pursuant to 42 U.S.C. § 1983 is two or three years. 97 N.M. at 451, 640 P.2d at 1331. The Decision on Certiorari issued by the New Mexico Supreme Court, which quashed certiorari in *DeVargas*, was not decided until after this lawsuit was filed (J.A. 15-16). 97 N.M. 563, 642 P.2d 166 (1982).

The Plaintiff relied on federal precedent in filing his federal civil rights action. *Hansbury* v. *Regents of the University of California; Gunther* v. *Miller; Shah* v. *Halliburton*. The Tenth Circuit has ruled that the claim in this case was timely filed. 731 F.2d at 651. But, if this court should determine that the NMTCA two-year limitation applies to the Complaint in this case, the Plaintiff should nonetheless be allowed to proceed, and the Court should make its holding prospective only. *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984);

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[32] The annotation to N.M.Stat.Ann. § 41-4-15 (Cum.Supp. 1981) reads:

> *Section inapplicable to federal civil rights action.*—An action under 42 U.S.C. § 1983 for excessive use of force during an arrest is not governed by the limitations on actions contained in this section but by the general statutory limitations on actions for personal injury, 37-1-8 NMSA 1978, or for miscellaneous claims, 37-1-4 NMSA 1978. *Gunther* v. *Miller*, 498 F.Supp. 882 (D.N.M. 1980).

Abbitt v. *Franklin*, 731 F.2d 661 (10th Cir. 1984); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). In *Chevron*, this Court noted the three factors which are relevant to the non-retroactive application of judicial decisions. 404 U.S. at 106-07, 92 S.Ct. at 355-56.

The Court, in *Jackson* v. *City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) *(en banc)*, stated that the *Chevron* "approach has consistently been utilized where changes in statute of limitations or other aspects of the timeliness of a claim are at issue." *Occhino* v. *United States*, 686 F.2d 1302, 1308 n.7 (8th Cir. 1982). *See also Singer* v. *Flying Tiger Line, Inc.*, 652 F.2d 1349, 1353 (9th Cir. 1981); *Wachovia Bank & Trust Co.* v. *National Student Marketing Corp.*, 650 F.2d 342, 346-48 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954, 101 S.Ct. 3098, 69 L.Ed.2d 965 (1981).

An analysis of the *Chevron* criteria demonstrates that the Plaintiff in this case is clearly entitled to nonretroactive application of any new interpretation of the § 1983 statute of limitations period. The clear past precedent upon which the Plaintiff relied in filing this case regarding the New Mexico statute of limitations for actions filed pursuant to § 1983 were the federal decisions of the Tenth Circuit in *Hansbury* and *Shah* and the Federal District Court in *Gunther*. The Plaintiff was, and is, entitled to rely upon these two decisions and precedence for the timely filing of his Complaint in this case. "*Chevron* mandates nonretroactive application of a statute of limitations decision that overrules the weight of past precedent." *Wachovia Bank & Trust Co.* v. *Nat. Student Marketing*, 650 F.2d at 347. If this Court were to adopt the reasoning advanced by the Defendants and require that the NMTCA two-year statute of limitations be applied to this § 1983 action, this Court would cleary be overruling the weight of past precedent, and nonretroactive application of the decision would be proper. *Jackson* v. *City of Bloomfield*, *supra*.

The second criterion stated in *Chevron* also supports nonretroactive application of any change in the statute of

limitations. For the reasons stated in this Brief, the proper limitations period for § 1983 actions filed in New Mexico is N.M.Stat.Ann. § 37-1-8, the personal injury statute. *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir. 1984). But, if this Court were to decide to change the existing interpretation of the law, it must also consider that any change in the statute of limitations would hinder the federal policy of encouraging the remedial use of § 1983 suits in the federal Courts for litigants in New Mexico who relied on federal precedent.

Lastly, the third criterion of the *Chevron* test mandates prospectivity if this Court were to change the statute of limitations to the NMTCA period specifically rejected in *Gunther*. For if that occurred, as in *Chevron*, "[i]t would also produce the most 'substantial inequitable results' to hold that [plaintiff] 'slept on [his] rights' at a time when [he] could not have known the time limitation that the law imposed upon [him]." 404 U.S. at 108, 92 S.Ct. at 356. *Jackson* v. *City of Bloomfield*, 731 F.2d at 655. *Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984).

Therefore, for all the foregoing reasons, if this Court should change the interpretation of the statute of limitations, as it applies to § 1983 actions filed in New Mexico, to be the limitations period of the NMTCA, § 41-4-15, then this new interpretation should be given prospective application so as to not bar the claim of the Plaintiff.

CONCLUSION

For all the foregoing reasons, the Respondent, Gary Garcia, respectfully Requests that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed. In the alternative, if this Court should determine to reverse the Court below, then the Respondent respectfully requests that said decision be applied prospectively only.

Respectfully submitted,

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APPENDIX

APPENDIX

PART A: STATUTES:

Section 3 of the Civil Rights Act of April 9, 1866:

As enacted, § 3 of the Civil Rights Act of April 9, 1866, ch. 31, 14 Stat. 27, read, in part, as follows:

'That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act. . . . The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.'

Section 1 of the Civil Rights Act of April 20, 1871:

Section 1 of the Act of April 20, 1871, taken from the Appendix to the Congressional Globe, 42nd Cong. 1st Session, 335, 17 Stat. 13, reads:

> CHAP. XXII.—An Act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication;' and the other remedial laws of the United States which are in their nature applicable in such cases.

Revised Statute § 722:

Revised Statute § 722 reads as follows:

SEC. 722. The jurisdiction in civil and criminal matters conferred on the district and circuit courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

PART B: INJURY TO PERSONAL RIGHTS OR PERSONAL INJURY STATUTES OF LIMITATION: 50 STATE SURVEY

State	No. of Years	Statute
Alabama	1	Ala.Code § 6-2-39(a) (5) (1975) (*Rubin* v. *O'Koren*, 644 F.2d 1023 (5th Cir. 1981))
Alaska	2	Alaska Stat. § 09.10.070(1) (1973) (*Austin* v. *Fulton Insurance Co.*, 444 P.2d 536 (Alaska 1968))
Arizona	2	Ariz.Rev.Stat.Ann. § 12-542(1) (1982) (*Hansen* v. *Stoll*, 130 Ariz. 454, 636 P.2d 1236 (Ariz.App. 1981))
Arkansas	3	Ark.Stat.Ann. § 37.206 (1947) (*Simpson* v. *Bailey*, 729 Ark. 27, 648 S.W.2d 464 (1983))
California	1	Cal.Civ.Proc. Code § 340(3) (West 1982) (*Rubino* v. *Utah Canning Co.*, 123 C.A.2d 18, 266 P.2d 163 (1954))
Colorado	3	Colo.Rev.Stat. § 13-80-108(1) (b) (1973) (*McKay* v. *Hammock*, 730 F.2d 1367 (10th Cir. 1984))
Connecticut	2	Conn.Gen.Stat. § 52-584 (1983) (*McDonald* v. *Haynes Medical Laboratory, Inc.*, 192 Conn. 327, 471 A.2d 646 (1984))
Delaware	2	Del. Code Ann. tit. 10, § 8119 (1974) (*Shaw* v. *Aetna Life Insurance Co.*, 395 A.2d 384 (Delaware 1978))

State	No. of Years	Statute
D.C.	3	D.C. Code Ann. § 12-301(8) (1981) (*Estate of Chappelle* v. *Sanders*, 442 A.2d 157 (D.C. App. 1982))
Florida	4	Fla.Stat. § 95.11(3) (1983) (*Gasparro* v. *Horner*, 245 So.2d 901 (Fla. 1971))
Georgia	2	Ga. Code § 3-1004 (1975) (*Leggett* v. *Benton Bros. Drayage & Storage Co.*, 138 Ga.App. 761, 227 S.E.2d 397 (1976))
Hawaii	2	Hawaii Rev.Stat. § 657-7 (1976) (*Azada* v. *Carson*, 252 F.Supp. 988 (D.Hawaii 1966))
Idaho	2	Idaho Code § 5-219(4) (1979) (*Billings* v. *Sisters of Mercy of Idaho*, 86 Idaho 485, 389 P.2d 224 (1964))
Illinois	2	Ill.Rev.Stat.Ch. 110, § 13-202 (1983) (*Mitchell* v. *White Motor Company*, 58 Ill.2d 159, 317 N.E.2d 505 (1974))
Indiana	2	Ind. Code § 34-1-2-2(1) (1973) (*Tolen* v. *A.H. Robins Co., Inc.*, 570 F.Supp. 1146 (N.D.Indiana 1983))
Iowa	2	Iowa Code § 614.1(2) (1983) (*Gookin* v. *Norris*, 261 N.W.2d 692 (Iowa 1978))
Kansas	2	Kan.Stat.Ann. § 60-513(a) (4) (1976) (*Pike* v. *City of Mission, Kan.*, 731 F.2d 655 (10th Cir. 1984))

State	No. of Years	Statute
Kentucky	1	Ky.Rev.Stat. § 413.140(a) (Ky. 1972) (*Blackburn* v. *Burchett*, 335 S.W.2d 342 (1960))
Louisiana	1	La.Civ.Code Ann. art. 3536 (1953) (*Warner* v. *New Orleans & C.R. Co.*, 134 La. 897, 64 So. 823 (1901))
Maine	6	Me.Rev.Stat.Ann. tit. 14, § 752 (1980) (*Williams* v. *Ford Motor Co.*, 342 A.2d 712 (Me. 1975))
Maryland	3	Md.Cts. & Jud.Proc. Code Ann. § 5-101 (1984) (*Davidson* v. *Koerber*, 454 F.Supp. 1256 (1978))
Massachusetts	3	Mass.Gen.Laws Ann.Ch. 260, § 2A (1980) (*Baldassari* v. *Public Finance Trust*, 369 Mass. 33, 337 N.E.2d 701 (1975))
Michigan	3	Mich.Comp. Laws Ann. § 600.5805(8) (Cum.Supp. 1984) (*Marlowe* v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973))
Minnesota	2	Minn.Stat. § 541.07(1) (1982) (*Wild* v. *Rarig*, 302 Minn. 419, 234 N.W.2d 775 (1975))
Mississippi	6	Miss. Code Ann. § 15-1-49 (1972) (residual provisions) (*Nelson* v. *James*, 435 So.2d 1189 (Miss. 1983))
Missouri	5	Mo.Rev.Stat. § 516.120(4) (1978) (*Tretter* v. *Johns-Manville Corp.*, 88 F.R.D. 329 (E.D.Mo. 1980))

State	No. of Years	Statute
Montana	3	Mont. Code Ann. § 27-2-204(1) (1983) (*Much* v. *Sturm, Ruger & Co., Inc.*, 502 F.Supp. 743 (D.Montana 1980))
Nebraska	4	Neb.Rev.Stat. § 25-207(3) (1979) (*Grand Island School District #2* v. *Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979))
Nevada	2	Nev.Rev.Stat. § 11.190(4) (e) (1979) (*Meadows* v. *Sheldon Pollack Corp.*, 92 Nev. 636, 556 P.2d 546 (1976))
New Hampshire	6	N.H.Rev.Stat.Ann. § 508:4(I) (1983) (*Robbins* v. *Seakamp*, 122 N.H. 318, 444 A.2d 537 (1982))
New Jersey	2	N.J.Rev.Stat. § 2A:14-2 (1952) (*Rex* v. *Hunter*, 26 N.J. 489, 140 A.2d 753 (1958))
New Mexico	3	N.M.Stat.Ann. § 37-1-8 (1978) (*Hartford* v. *Gibbons & Reed Co.*, 617 F.2d 567 (10th Cir. 1980))
New York	3	N.Y.Civ.Prac. Law § 214(5) (1978) (*Levine* v. *Sherman*, 384 N.Y.S.2d 685, 86 Misc.2d 997 (1976))
North Carolina	3	N.C.Gen.Stat. § 1-52(5) (1983) (*Sheppard* v. *Barrus Construction Co.*, 11 N.C.App. 358, 181 S.E.2d 130 (1971))

State	No. of Years	Statute
North Dakota	6	N.D.Cent. Code § 28-01-16(5) (1974) (*Keller* v. *Clark Equipment Co.*, 474 F.Supp. 966 (D.North Dakota 1979))
Ohio	4	Ohio Rev.Code Ann. § 2305.09(D) (1981) (*Schorle* v. *City of Greenhills*, 524 F.Supp. 821 (S.D.Oh. 1981))
Oklahoma	2	Okla.Stat. tit. 12, § 95(3) (1981) (*Abbitt* v. *Franklin*, 731 F.2d 661 (10th Cir. 1984))
Oregon	2	Or.Rev.Stat. § 12.110(1) (1983) (*U.S. National Bank of Oregon* v. *Davies*, 274 Or. 663, 548 P.2d 966 (1976))
Pennsylvania	2	Pa.Cons.Stat. § 42-5524(2) (1981) (*Donnelly* v. *DeBourke*, 280 Pa.Super. 486, 421 A.2d 826 (1980))
Puerto Rico	1	P.R. Laws Ann. tit. 31, § 5298(2) (1968) (*Graffels Gonzalez* v. *Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977) *per curiam*))
Rhode Island	3	R.I.Gen. Laws § 9-1-14 (1956) (*Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945 (1st Cir. 1978))
South Carolina	6	S.C. Code Ann. § 15-3-530(5) (1976) (*Simmons* v. *South Carolina State Ports Authority*, 694 F.2d 63 (4th Cir. 1982))

State	No. of Years	Statute
South Dakota	3	S.D. Codified Laws Ann. § 15-2-14(3) (1984) (*Titze* v. *Miller*, 337 N.W.2d 176 (S.D. 1983))
Tennessee	1	Tenn. Code Ann. § 28-3-104(a) (1980) (*Brown* v. *Dunstan*, 219 Tenn. 291, 409 S.W.2d 365 (1966))
Texas	2	Tex.Stat.Ann. art. 5526(6) (1958) (*Braden* v. *Texas A & M University System*, 636 F.2d 90 (5th Cir. 1981))
Utah	4	Utah Code Ann. § 78-12-25(2) (1953) (*Matheson* v. *Pearson*, 619 P.2d 321 (Utah 1980))
Vermont	3	Vt.Stat.Ann. tit. 12, § 512(4) (1974) (*Kinney* v. *Goodyear Tire & Rubber Co.*, 134 Vt. 571 367 A.2d 677 (1976))
Virginia	2	Va. Code § 8.01-243(A) (1950) (*Runyon* v. *McCrary*, 427 U.S. 160 (1976))
Virgin Islands	2	V.I. Code Ann. tit. 5, § 31(5)(A) (1950)
Washington	3	Wash.Rev. Code § 4.16.080(2) (1983) (*Rose* v. *Rinaldi*, 654 F.2d 546 (9th Cir. 1981))

State	No. of Years	Statute
West Virginia	2	W.Va. Code § 55-2-12 (1981) (*McCausland* v. *Mason County Bd. of Educ.*, 649 F.2d 278 (4th Cir.), *cert. denied*, 454 U.S. 1098 (1981))
Wisconsin	3	Wis.Stat. § 893.54 (1983) (*Pulchinski* v. *Strnad*, 88 Wis.2d 423, 276 N.W.2d 781 (1979))
Wyoming	4	Wyo.Stat. § 1-3-105(a)(iv)(c) (1973) (*Riley* v. *Union P.R.R.*, 182 F.2d 765 (10th Cir. 1950))

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-2146

In The

Supreme Court of the United States

October Term, 1984

RICHARD WILSON and MARTIN VIGIL,

Petitioners,

v.

GARY GARCIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The Court Below Erred In Undertaking An Independent Search For The Appropriate State Limitations Period.

A. State Law Provides the Statute of Limitations in a § 1983 Action and the Limitations Period Identified by a State's Highest Court Cannot Be Rejected Unless Inconsistent With the Constitution and Laws of the United States.

Respondent Gary Garcia, the Plaintiff below (hereinafter the Plaintiff), misconstrues this Court's decision in *Burnett v. Grattan,* 104 S. Ct. 2924 (1984). In *Burnett,* the Court identified the task imposed by 42 U.S.C. § 1988 (hereinafter § 1988) as a three-step process. The first step is to determine whether any federal law on point exists. "If no suitable federal rule exists, courts undertake the second step by considering application" of state law. The third step involves an inquiry into whether the state law otherwise applicable is inconsistent with the Constitution and laws of the United States. Section 1988 protects the federal interest by rejecting state law found to be inconsistent with federal law. 104 S. Ct. at 2929.

The Plaintiff claims that the first step of the process identified in *Burnett* requires "the essential nature of the federal action [to be] characterized according to federal law." Respondent's Brief at 13. This claim, however, ignores the *Burnett* Court's observation that where statutes of limitations for actions brought under 42 U.S.C. § 1983 (hereinafter § 1983) are concerned, the first step of the § 1988 analysis raises no issue:

> On several occasions, this Court has rejected arguments that a particular federal statute of limitations applied. . . . It is now settled that federal courts will

turn to state law for statutes of limitations in actions brought under these civil rights statutes.

104 S. Ct. at 2929 (citations omitted). Federal law which might supply a rule of decision in the selection of a limitations period does not exist; it is "settled" that state law is the only source for the applicable rule. The starting point of the analysis in this case, therefore, is the second step of the *Burnett* analysis: the identification of the statute of limitations "which the State would apply if the action had been brought in a state court." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 469 (1975) (Marshall, J., concurring in part and dissenting in part).

Unlike *Burnett*, the instant case arose in a state whose highest court has already made the required identification. *DeVargas v. State ex rel. New Mexico Department of Corrections*, 97 N.M. 563, 642 P.2d 166 (1982). The only step left for the federal court thus is an analysis of whether the application of the state law so identified is inconsistent with federal law. The Plaintiff in his brief offers no justification for the Tenth Circuit's summary dismissal of New Mexico law as announced in *DeVargas* other than the attraction of fashioning a federal common law of characterization in order to help identify state law. This approach to limitations problems, however, was rejected by this Court in *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Because the applicable law in this case has been identified by the state, the court below erred in engaging in an independent analysis of the Plaintiff's claim to identify the applicable state law. *See* Brief for Petitioners at 7-24.

B. Borrowing State Law in a § 1983 Action Is Consistent With the History and Purpose of § 1983.

The Civil Rights Act of 1871 was intended to provide a federal remedy where state remedies were likely to be abridged or unavailable. *Allen v. McCurry*, 449 U.S. 90, 98 (1980). Thus, § 1983 does not create substantive rights; it creates only a remedy. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618 (1979). While Congress did not trust the states to provide that remedy, *Monroe v. Pape*, 365 U.S. 167 (1961), *overruled on other grounds, Monell v. Department of Social Services*, 436 U.S. 658 (1978), it did trust state law to provide appropriate rules to guide the litigation of the federal claim in areas Congress did not choose to address. *Tomanio;* 42 U.S.C. § 1988. One such area involves statutes of limitations.[1] *Burnett.*

This Court has held that state policies of repose are not disfavored by the Civil Rights Act, *Board of Regents v. Tomanio*, and that state laws of limitations apply to

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[1] The remarks of Representative Sheldon regarding the Civil Rights Act are pertinent: "Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed upon them. The local authorities ought to understand best the wants and condition of the people over whom they rule. It is essential to the maintenance of peace and order, and to the inculcation of respect for and obedience to law, that the State governments should be respected and upheld by the General Government. It is as much the duty of the national Government to support that of the State, and to maintain its authority, as it is to provide an ultimate remedy for the redress of every wrong inflicted upon the citizen." Cong. Globe, 42d Cong., 1st Sess. 368 (1871).

civil rights actions unless found to be inconsistent with federal law. *Id.* This recognition of policies of federalism in § 1983 actions is consistent with the Court's historical deference to state policies in other circumstances where state law has been used to "fill in the gaps" in federal law. In *Board of County Commissioners v. United States*, 308 U.S. 343 (1939), this Court stated,

> Nothing seems to us more appropriate than due regard for local institutions and local interests. . . . In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved [litigants] in their relation with the states or their political subdivisions.

Id. at 351-52 (holding that state law barring recovery of interest from a county for taxes wrongfully collected was applicable to Indian taxpayers from whom the county had collected taxes in violation of federal law); *see also Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 154-55 (1944). The Tenth Circuit's summary dismissal of New Mexico state law and its substitution of an ad hoc rule of federal common law was therefore improper.[2]

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[2] Even those circuits that have arguably adopted a "uniform" approach to characterization similar to that adopted by the court below, e.g., *Garmon v. Foust*, 668 F.2d 400 (8th Cir.), *cert. denied*, 456 U.S. 998 (1982); *Beard v. Robinson*, 563 F.2d 331 (7th Cir. 1977), *cert. denied*, 438 U.S. 907 (1978); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962), have applied limitations periods to civil rights actions that derive from statutes of limitations specifically applicable to actions against public officials rather than statutes applicable to the characterization otherwise adopted, e.g., *Foster v. Armontrout*, 729 F.2d 583 (8th Cir. 1984); *Blake v. Katter*, 693 F.2d 677 (7th Cir. 1982); *Kosikowski v. Bourne*, 659 F.2d 105 (9th Cir. 1981). See Point II *infra*.

C. Applicable New Mexico Law Holds That a § 1983 Claim Against Law Enforcement Officers Is Barred by the Two-Year Statute of Limitations Set Forth in N.M. Stat. Ann. § 41-4-15 (1978).

The Plaintiff in his brief appears to argue that the Tenth Circuit properly declined to follow *DeVargas* because *DeVargas* presents an incorrect analysis of state law. Brief for Respondent at 23-32. Not only is this argument irrelevant, as the only relevant issue is whether *DeVargas* is state law, this argument is also incorrect.[3]

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[3] The Plaintiff's attempt to discount the New Mexico Supreme Court's opinion in *DeVargas* because that opinion was rendered in the form of an order quashing a writ of certiorari lacks merit. The concurring opinion of Judge Sutin in *Gonzalez v. Stanke-Brown & Associates, Inc.*, 98 N.M. 379, 648 P.2d 1192 (Ct. App. 1982), on which the Plaintiff relies, is not on point. The discussion in that case on the impact of an order quashing certiorari concerned an order of the New Mexico Supreme Court which was entered without a published opinion. By rule, such an order has no precedential value. N.M. S. Ct. Misc. R. 7. An order of the New Mexico Supreme Court which is accompanied by a published opinion, however, carries the same precedential value as any other published opinion of that court: whether the opinion is issued as a decision quashing certiorari or as a decision affirming or reversing a judgment is irrelevant. N.M. S. Ct. Misc. R. 7; *see Sena School Bus Co. v. Board of Education*, 101 N.M. 26, 30, 677 P.2d 639, 643 (Ct. App. 1984) (citing *DeVargas*); *Cozart v. Town of Bernalillo*, 99 N.M. 737, 663 P.2d 713 (Ct. App. 1983) (citing *DeVargas*); *see also LaBarge v. Stewart*, 84 N.M. 222, 224, 501 P.2d 666, 668 (Ct. App.), *cert. denied*, 84 N.M. 219, 501 P.2d 663 (1972) (citing *Taos Ski Valley, Inc. v. Elliott*, 83 N.M. 763, 497 P.2d 974 (1972), an opinion quashing a writ of certiorari); *Williams v. Town of Silver City*, 84 N.M. 279, 288, 502 P.2d 304, 313 (Ct. App.), *cert. denied*, 84 N.M. 271, 502 P.2d 296 (1972) (Sutin J., partially concurring and dissenting); *cf. State v. Reese*, 91 N.M. 76, 570 P.2d 614 (Ct. App. 1977). Thus, it matters little that the

(Continued on following page)

In *DeVargas* both the New Mexico Court of Appeals and the New Mexico Supreme Court found that the most appropriate limitations period for a § 1983 action filed in state court against law enforcement officers was that set forth in N.M. Stat. Ann. § 41-4-15 (1978), which provides a two-year limitations period for "actions against a governmental entity or a public employee for torts." 97 N.M. at 564, 642 P.2d at 167 (Supreme Court); 97 N.M. 447, 450-51, 640 P.2d 1327, 1330-31 (Ct. App. 1981). The Plaintiff argues that because § 41-4-15 uses the word "torts" rather than the words "constitutional torts," the *DeVargas* courts erred in finding that § 41-4-15 applies to § 1983 claims.

The fact that a tort may not be identical to a constitutional deprivation, however, does not mean that such claims are not analogous, *see Parratt v. Taylor*, 451 U.S. 527 (1981), or that § 41-4-15 does not apply to both types of claims, *see Graffals Gonzalez v. Garcia Santiago*, 550 F.2d 687 (1st Cir. 1977). The New Mexico Supreme Court's holding in *DeVargas* that § 41-4-15 applies to torts and constitutional torts alike is a dispositive holding that under New Mexico law § 41-4-15 is in fact applicable to constitutional torts such as those raised by the Plaintiff in this case. *Cf. Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 484-85 (1981) (Stevens, J., dissenting)

(Continued from previous page)

result of the opinion in DeVargas was to quash a writ of certiorari. See also Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) (cited authoritatively in Cook v. Hudson, 429 U.S. 165 (1976); The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183 (1959); Dick v. New York Life Insurance Co., 359 U.S. 437, 450 (1959) (Frankfurter, J., dissenting)).

("Even if the state court should tell us that a state statute has a meaning that we believe the state legislature plainly did not intend, we are not free to take our own view of the matter.").

The decision in *Wells v. County of Valencia*, 98 N.M. 3, 644 P.2d 517 (1982), on which the Plaintiff relies, does not undermine the holding of *DeVargas*. In *Wells* the New Mexico Supreme Court addressed the question of whether the exclusive remedy provision of the New Mexico Tort Claims Act (hereinafter the Act), N.M. Stat. Ann. § 41-4-17(A) (1978), barred a plaintiff from proceeding under the Act if the plaintiff also brought a claim under 42 U.S.C. § 1983 by reason of the same occurrence or chain of events.[4] The court concluded that the supremacy clause would be violated if the Act were interpreted so as to have a chilling effect on the plaintiff's ability to exercise his federal rights, and thus held that the Act's exclusivity provision did not prohibit suit if the plaintiff also sought relief under § 1983.

The court in *Wells* recognized a distinction between a § 1983 claim and a tort claim in the context of recognizing that not all torts committed under color of law amount to constitutional deprivations, but also recognized that "a Section 1983 action is a species of tort liability," 98 N.M.

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[4] Section 41-4-17(A) provides in part that "[t]he Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a governmental entity or against the public employee or his estate whose act or omission gave rise to the suit or claim."

at 5, 644 P.2d at 519. While the distinction noted in *Wells* was relevant in that case because it led to the possible chilling effect of the exclusivity provision,[5] such a distinction is not relevant for purposes of § 41-4-15, and does not undermine the analogy drawn in *DeVargas*.

The *DeVargas* courts did not find that torts and § 1983 claims are identical. The courts in *DeVargas* found only that a cause of action under N.M. Stat. Ann. § 41-4-12 (1978) was the most analogous state claim to the § 1983 claim there at issue. Section 41-4-15 was deemed the applicable limitations period because it applies to § 41-4-12 claims and, by the analogy required by *Board of Regents v. Tomanio*, therefore applied to the plaintiff's § 1983 claims.[6] The analogy between § 41-4-12 claims and § 1983

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[5] If there were no difference between a tort claim and a § 1983 claim, a plaintiff would not lose anything if he lost the right to bring one claim upon bringing the other. Principles against double recovery or the doctrine of *res judicata* would negate the purpose of bringing the second claim in any event. It is important to be able to bring both claims because damages may be different and because the conduct complained of may not be of constitutional dimension but may still warrant recovery under the Act.

[6] The *DeVargas* decision is determinative of the Plaintiff's claim against Petitioner Wilson and is also determinative of the statute of limitations applicable to the Plaintiff's claim against Petitioner Vigil, Chief of the New Mexico State Police. The Plaintiff's claim against Vigil is premised on negligent hiring and negligent supervision theories. *DeVargas* involved a claim against the warden of the New Mexico penitentiary. The complaint alleged that the warden "failed to take adequate action to remove [the unqualified] employees from their positions as guards and, generally, was negligent in his training, supervision and disciplining of these employees." *DeVargas*, 97 N.M. at 450, 640 P.2d at 1330 (Ct. App.). The *DeVargas* court held that the plaintiff's claim against the warden was governed by the two-year limitations period of § 41-4-15. 97 N.M. at 564, 640 P.2d at 167 (Sup. Ct.). Thus, it is clear that the *DeVargas* decision is controlling with respect to any claim in this case against Vigil.

claims based upon police brutality is not undermined by recognition of the obvious fact that there is some difference between ordinary torts and claims of constitutional deprivation.[7] The fact that the word "torts"—when used in a different context in a different statutory section—has been interpreted not to include claims under § 1983 does not negate the fact that the limitations period set forth in § 41-4-15 applies equally to torts and to analogous claims, including constitutional torts.[8]

II. Application Of § 41-4-15 To This Case Is Not Inconsistent With Federal Law Or The Policies Of Compensation And Deterrence Embodied In § 1983.

Because New Mexico law is clear, § 41-4-15 must be applied to the Plaintiff's § 1983 claims unless the application of that statute is "inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988; *see Burnett*. The Plaintiff argues that the application of § 41-4-15 to his § 1983 claims is inconsistent with federal law because (1) this statute of limitations is codified in the New Mexico Tort Claims Act and (2) the statute imposes a two-year limitations period specifically applicable to actions against public entities and public employees. Neither

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[7] The continuing vitality of *DeVargas* is highlighted by the post-*Wells* reliance on *DeVargas* by the New Mexico Court of Appeals. *See Sena School Bus Co.*, 101 N.M. at 30, 677 P.2d at 643; *Cozart v. Town of Bernalillo*.

[8] *See Wells*, 98 N.M. at 5, 644 P.2d at 519 ("a Section 1983 action is a species of tort liability"). *See also Parratt; Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981); *Monell v. Department of Social Services*, 436 U.S. 658 (1978); S. Rep. No. 588, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 2789 (reference to *Bivens* action as an action for constitutional torts).

of these attributes, however, evidences hostility on the part of the state to the Plaintiff's federal claim, and therefore does not provide a basis on which to hold the application of § 41-4-15 inconsistent with federal law.[9]

The Plaintiff first argues that the application of § 41-4-15 to § 1983 claims would be inconsistent with federal law because the New Mexico Tort Claims Act is an Act in "derogation of rights [of a] civil rights litigant." Brief for Respondent at 28. The Defendants, however, do not seek to apply all provisions of the Act to the Plaintiff's claims—only the statute of limitations codified therein.[10]

The fact that a statute of limitations is codified in a Tort Claims Act does not, in itself, create an inconsistency with federal law within the meaning of § 1988. *See Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983); *Nored v. B'ekm*, 743 F.2d 1386 (9th Cir. 1984) (per curiam); *Kosikowski v. Bourne*. The Plaintiff's reliance on Ninth Cir-

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9 The Plaintiff in his brief claims that the Tenth Circuit "implicitly found" § 41-4-15 to be inconsistent with federal law. Brief for Respondent at 12. This is incorrect. The Tenth Circuit simply disregarded that statute, and never addressed the issue of inconsistentency. *Garcia v. Wilson*, 731 F.2d 640, 651 n.5 (10th Cir. 1984).

10 The Plaintiff seeks support for his position in *Burnett v. Grattan*. *Burnett*, however, is distinguishable on its facts. The issue in that case was whether a state limitations period applicable to the filing of an administrative claim was applicable to a § 1983 action. The Court quite properly noted that the legislative intent behind the enactment of an administrative scheme was likely to be at variance with the intent in enacting a statute of limitations for a judicial action. In addition, the Plaintiff ignores the fact that New Mexico has had a statute of limitations specifically applicable to governmental entities or public employees since 1880, almost 100 years before the enactment of the Tort Claims Act.

cuit cases such as *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970), must be read in light of that court's subsequent decision in *Kosikowski* which approved the use of a limitations period set forth in the Oregon Tort Claims Act. The Plaintiff, in fact, has cited to no decision which has held that a reasonable limitations period identified by a state as applicable to § 1983 actions is inconsistent with federal law merely because it is codified in a tort claims act.[11]

The Plaintiff also argues that because § 41-4-15 provides a shorter period of time for actions against governmental entities and public employees than for similar actions against other defendants, it is inconsistent with federal law. This argument also lacks merit.

The principal early case discussing whether a state statute of limitations is inconsistent with federal policy

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11 The Plaintiff seeks to avoid the application of § 41-4-15 by arguing that the use of this limitations period would require the impermissible application to his § 1983 claim of the 90-day notice provision set forth in an entirely different statutory section of the New Mexico Tort Claims Act. This argument, however, is a red herring. No New Mexico opinion has suggested that the notice provision of N.M. Stat. Ann. § 41-4-16 (1978) applies to § 1983 claims. By its terms, § 41-4-16 applies only to actions against the state or a local public body and not to actions against public officials. *Martinez v. City of Clovis*, 95 N.M. 654, 625 P.2d 583 (Ct. App. 1980). In addition, this statute applies only to those who claim damages "under the Tort Claims Act." One who claims under § 1983, therefore, is not encompassed by this provision. (In contrast, § 41-4-15 applies to all claims against governmental entities or employees "for torts.") The Tenth Circuit has specifically ruled that short-period notice provisions of state tort claims acts are inapplicable to § 1983 claims, *Childers v. Independent School District No. 1*, 676 F.2d 1338 (10th Cir. 1982); *see also Brown v. United States*, 742 F.2d 1498 (D.C. Cir. 1984) (en banc), and there is no reason to believe that New Mexico courts would interpret the notice provisions as applicable to a claim brought under § 1983.

is *Campbell v. City of Haverhill*, 155 U.S. 610 (1895). In *Campbell*, the Court was concerned with whether a state statute of limitations should apply to a federal patent infringement action which could be brought only in federal court. The Court concluded that the state limitations period should apply unless the period was either too short or discriminatory against the federal cause of action. *Id.* at 615.

At no point has the Plaintiff in this case argued that the two-year period provided in § 41-4-15 is too short. The Plaintiff nonetheless argues that because § 41-4-15 provides a shorter limitations period for actions against public employees than is provided for actions against others, application of this provision to § 1983 claims discriminates against the federal cause of action. The fact that § 41-4-15 applies equally to state and federal claims alike, however, negates any claim that § 41-4-15 discriminates against the federal action.

Cases holding that a state statute of limitations is discriminatory have done so on the ground that the statute involved applied only to federal claims. *E.g., Johnson v. Davis*, 582 F.2d 1316 (4th Cir. 1978) (§ 1983); *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd mem.*, 327 U.S. 757 (1946) (Fair Labor Standards Act); *Caldwell v. Alabama Dry Dock & Shipbuilding Co.*, 161 F.2d 83 (5th Cir.), *cert. denied*, 332 U.S. 759 (1947) (Fair Labor Standards Act); *Matthewman v. Akahane*, 574 F. Supp. 1510 (D. Hawaii 1983) (§ 1983); *see Nored v. Blehm.* In each of these cases, the court construed a state statute of limitations which, by its terms, was applicable only to federal actions. In each case the statute was ruled discriminatory because it provided a shorter period for

federal claims than for analogous state claims and because it deviated from the general limitations scheme of the state by categorizing actions with reference to the authority which created the right rather than by the nature of the right asserted. These infirmities are not present in § 41-4-15. Section 41-4-15 applies equally to state and federal claims, and although § 41-4-15 distinguishes between claims on the basis of the identity of the parties, it is not unique among New Mexico statutes in so defining a limitations period. *See, e.g.*, N.M. Stat. Ann. § 41-5-13 (1978) (limitations period for medical malpractice actions); N.M. Stat. Ann. § 37-1-8 (1978) (limitations period for actions against sureties); *see also Armijo v. Tandysh*, 98 N.M. 181, 646 P.2d 1245 (Ct. App. 1981), *cert. quashed*, 98 N.M. 336, 648 P.2d 794, *cert. denied*, 459 U.S. 1016 (1982) (upholding different rules of accrual for wrongful death actions based on medical malpractice and other wrongful death actions).

The court in *Matthewman v. Akahane* addressed the difference between a statute applicable only to federal statutory claims and one applicable to both state and federal claims. The court distinguished the limitations provision at issue in *Kosikowski v. Bourne* from the Hawaii statute before the court in *Akahane* on the ground that since the limitations period at issue in *Kosikowski* applied to state claims arising under the tort claims act as well as to federal claims arising under § 1983, the statute did not discriminate against the federal action. The statute at issue in the case at bar is identical to the statute at issue in *Kosikowski:* it does not discriminate against federal causes of action because both state and federal claims against public employees are governed by the same limitations

period. *See Nored v. Blehm* (rejecting a claim that the Oregon statute of limitations applicable to § 1983 actions was invalid because it differentiates between governmental and private parties); *cf. Metcalf v. City of Watertown,* 153 U.S. 671 (1894) (state limitations statute applicable to actions on judgments construed to avoid discrimination between actions based on judgments of state court and actions based on judgments of federal court sitting in the state).

Rejection of a state statute of limitations because it reflects state policies which do not undermine the federal right would conflict with decisions of this Court which have found that state policies should be recognized where possible. *See, e.g., Board of Regents v. Tomanio; Wallis v. Pan American Petroleum Corp.; Davies Warehouse Co. v. Bowles; Board of County Commissioners v. United States.* Thus, statutes specifically applicable to public officials have been applied in civil rights actions by at least five circuits. *See, e.g., Foster v. Armontrout* (three-year statute for actions against public officials applied rather than five-year limitation for actions on a statute or ten-year residual provision); *Aitchison v. Raffiani* (two-year New Jersey Tort Claims Act provision applied rather than six-year contract claim provision); *Kosikowski v. Bourne* (two-year Oregon Tort Claims Act provision applied rather than six-year limitation for actions on a statute); *Blake v. Katter* (five-year limitations period for actions against a public officer applied rather than two-year statute for injuries to the person); *Green v. Ten Eyck,* 572 F.2d 1233 (8th Cir. 1978) (three-year limitations period for claims against public officials applied rather than 180-day period applicable to discrimination in housing claims); *Peterson v. Fink,*

515 F.2d 815 (8th Cir. 1975) (Missouri three-year statute applicable to public officers applied to *Bivens* action rather than five-year provision applicable to claims for injury to the person); *Allen v. Fidelity & Deposit Co. of Maryland,* 515 F. Supp. 1185 (D.S.C. 1981), *aff'd without opinion* 694 F.2d 716 (4th Cir. 1982) (three-year provision for actions against sheriff applied); *Gipson v. Township of Bass River,* 82 F.R.D. 122 (D.N.J. 1979) (two-year New Jersey statute applicable to public entities applied rather than six-year provision applicable to injuries to property interests).

Where there is no evidence of hostility on the part of the state to the federal cause of action, there is no reason to avoid recognition of state interests. *Tomanio; Aitchison; see Kosikowski.* Because legislatures enact statutes of limitations with the welfare of the state and its citizens in mind, to refuse to recognize state interests where they are not hostile to federal interests is to divorce whatever statute of limitations is deemed applicable from the policy and reason which engendered it. *See Aitchison.* The result is a purely arbitrary, unreasoned application of a limitations period.

The appropriate analysis is exemplified by *Robertson v. Wegmann,* 436 U.S. 584 (1978). In *Robertson,* the Court was concerned with whether Louisiana survivorship law should be applied to a § 1983 action where, if applied, it would cause the action to abate. In determining whether the application of state law in *Robertson* would be inconsistent with federal policy, the Court noted that the purposes of § 1983 were to provide compensation for those who were deprived of their civil rights and to deter abuse by government officials. The Court reasoned that no of-

ficial would feel free to abuse the rights of another because of the possibility that that person would die without a survivor capable of bringing the action, and that the compensation goal would not be hindered by refusing to allow the executor of the estate to recover.

In the case at bar, neither the goal of deterrence nor the goal of compensation would be thwarted by requiring a plaintiff to bring his claim within two years. No official will feel free to abuse another because of the possibility that that person might wait more than two years before filing an action, and anyone who pursues his rights diligently and has a valid claim will be compensated. *See Board of Regents v. Tomanio,* 446 U.S. at 488 (neither the policy of deterrence nor the policy of compensation "is significantly affected by this rule of limitations since plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years"). There is no basis, therefore, on which to hold that the application of § 41-4-15 to the Plaintiff's § 1983 claims would be inconsistent with federal law.

III. The Plaintiff Cannot Avoid The Application Of The Appropriate Limitations Period To The Case At Bar.

In Point III of his Brief, the Plaintiff argues that a decision of this Court applying a two-year limitations period to this action should be prospective only and should not affect the Plaintiff's claims. This argument is without merit, premised as it is on the Plaintiff's erroneous contention that applying a two-year limitations period to federal civil rights actions in New Mexico would constitute a clear break with precedent. *See Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971).

The Plaintiff cites two decisions to establish the "clear past precedent" on which he relied: *Hansbury v. Regents of University of California,* 596 F.2d 944 (10th Cir. 1979), and *Gunther v. Miller,* 498 F. Supp. 882 (D. N.M. 1980). These two cases, however, simply do not justify the Plaintiff's position that any decision in this action that would otherwise be adverse to the Plaintiff should be applied only prospectively.

The Plaintiff's reliance on *Hansbury* is misplaced. The claim in *Hansbury* accrued in 1970, six years before § 41-4-15 was enacted.[12] The court in *Hansbury* thus did not even consider that statute. Reliance on a "judicial opinion which does not take the statute into account is misplaced." *Nored v. Bohm,* 743 F.2d at 1387 (refusing to apply *Kosikowski* prospectively). *Gunther v. Miller,* the other case on which the Plaintiff relies, is a district court decision which is not binding on any other court, even one within the same district. *Valencia v. Stearns Roger Manu-*

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12 Subsection (B) of § 41-4-15 provides that, "The provisions of Subsection A of this section shall not apply to any occurrence giving rise to a claim which occurred before July 1, 1976." In addition, *Hansbury,* analogized to a contract claim, see *Zuniga v. AMFAC Foods, Inc.,* 580 F.2d 380 (10th Cir. 1978), *overruled in EEOC v. Caddis,* 733 F.2d 1373 (10th Cir. 1984), is factually distinct from the case at bar and did not involve an action against a public entity or employee.

facturing Co., 124 F. Supp. 670, 675 (D.N.M. 1954). If the Plaintiff relied on that decision, he did so unreasonably.[13]

Contrary to the Plaintiff's belief, the settled rule of law in effect in the Tenth Circuit prior to issuance of the opinion below was the rule expressed most explicitly in *Zuniga v. AMFAC Foods*, 580 F.2d at 384 n.3. The court there specifically held that an assessment of the conduct underlying a federal civil rights claim dictates the choice of the applicable limitations period. Under this rule, the Plaintiff's causes of action are, were and since 1976 have been subject to a limitations period of two years. N.M. Stat. Ann. § 41-4-15 (1978). See Brief for Petitioners at 24-38.

The Plaintiff's claim that applying a two-year limitations period to his action would represent a complete break with past precedent is untenable. At least one federal judge sitting in New Mexico has noted the "absence of clear guidelines or precedent," Pet. App. at 5, and judges in the District of New Mexico have applied varying statutes to federal civil rights claims. *Id.* Indeed, as the Tenth Circuit recognized in *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984), it is the decision presently on review that constitutes a break with precedent. To subvert the state policies of repose implicit in § 41-4-15 by accepting the Plaintiff's argument of prospectivity would be erroneous. *Cf. Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) ("The [state's] limitations periods, while guaranteeing the protection of the civil rights laws

[13] The Plaintiff's alleged reliance on the publisher's annotations to the New Mexico Statutes does not merit a response.

to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."). This Court's decision should therefore be applied to the litigant now before the Court.

CONCLUSION

For the reasons stated above and in the Brief for Petitioners, the decision of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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